No. 206

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In the
Supreme Court of the United States
OCTOBER TERM, 1959

CARPENTERS UNION, LOCAL 131; CARPENTERS UNION, LOCAL 1289; SEATTLE DISTRICT COUNCIL OF CARPENTERS, affiliated with THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO; TEAMSTERS, CHAUFFEURS AND HELPERS, LOCAL UNION NO. 174, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 302, AFL-CIO; and LOCAL 440, INTERNATIONAL HOD CARRIERS, BUILDING AND COMMON LABORERS' UNION OF AMERICA, AFL-CIO, *Petitioners,*

vs.

CISCO CONSTRUCTION CO., an Oregon corporation, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

On behalf of the Petitioners Carpenters Union, Local 131; Carpenters Union, Local 1289; Seattle District Council of Carpenters, affiliated with the United Brotherhood of Carpenters and Joiners of America, AFL-CIO; Teamsters, Chauffeurs and Helpers, Local Union 174 International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America:

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THE ARGUS PRESS, SEATTLE

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vs.

CISCO CONSTRUCTION CO., an Oregon corporation, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered herein on April 13, 1959, affirming a judgment previously entered by the United States District Court for the Western District of Washington, Northern Division, against the petitioners and in favor of the respondent in the amount of $75,000.00, in a damage action prosecuted by respondent under the provisions of Section 303 of the Labor Management Relations Act of 1947, 61 Stat. 158, 29 U.S.C. Sec. 187.

CITATIONS TO OPINIONS BELOW

The oral and written opinions of the United States District Court for the Western District of Washington, Northern Division, are unreported but are included in the certified record (R. 29-31; 55-59). The opinion of the United States Court of Appeals for the Ninth Circuit is as yet unreported but is included in the certified record (R. 565-572) and is printed in full in Appendix A, *infra*, pp. 71-81.

JURISDICTION

The jurisdiction of this court is invoked under the provisions of 28 U.S.C. Sec. 1254(1), as this case involves the final judgment of one of the United States Courts of Appeals.

The judgment of the Court of Appeals for the Ninth Circuit was entered on April 13, 1959 (R. 573; Appendix A, *infra*, p. 81). This petition for a writ of certiorari follows.[1]

STATUTORY PROVISIONS INVOLVED

The main statutory provisions involved are those included in the Labor Management Relations Act of 1947, 61 Stat. 136 *et seq.*, as amended, 29 U.S.C. Secs. 141-188. Pertinent sections of this Act are printed in Appendix B, *infra*, pp. 82-85.

Also involved are the provisions of the federal Shop Book Rule Act, 49 Stat. 1561, as amended, 28 U.S.C.

[1] Throughout the trial and appeal in this case the petitioners have appeared separately and have been represented by different attorneys. However, for the convenience of this court and because of the similarity of issues involved, the petitioners have joined in presenting a single petition for a writ of certiorari.

Sec. 1732. Pertinent sections of this Act are printed in Appendix B, *infra*, pp. —.

QUESTIONS PRESENTED

1. In a situation where, pursuant to an economic strike against an employer, a union has engaged in lawful and primary picketing of the employer's premises, and where, thereafter, this union and other unions engage in activities away from the employer's premises which constitute unlawful "secondary boycott" activities, do these secondary activities "infect" or "spoil" the primary picketing, so as to render these unions jointly and severally liable to the employer for all damages resulting from the primary picketing, in a suit for damages under Section 303 of the Labor Management Relations Act?

The court below answered this question in the affirmative.

2. Does the federal Shop Book Rule Act, 28 U.S.C. Sec. 1732, permit the introduction in evidence of a summary or recapitulation of receipts and disbursements prepared by a third party not called to testify, and other documents based upon it, where there was no showing that such document was prepared at the time of the events or within a reasonable time thereafter, where such document was not prepared by an employee in the regular course of business, and where there was no showing of authenticity or accuracy?

The court below answered this question in the affirmative.

STATEMENT OF THE CASE

I. Cisco's Damage Action in the United States District Court for the Western District of Washington

In the spring of 1956, the respondent Cisco Construction Company brought an action for damages against the petitioner unions in the United States District Court for the Western District of Washington, Northern Division (R. 3-10). Respondent founded its action upon Section 303 of the Labor Management Relations Act of 1947 (R. 4; Appendix B, *infra*, pp. 84-85)[2]. It was alleged that the petitioners had engaged in a course of conduct made unlawful under the Act and that this course of conduct had caused damage to respondent in the amount of $469,652.22 (R. 9).

In due course issue was joined and the case came on for trial, on July 9, 1956, before the Honorable George H. Boldt, a judge of the United States District Court for the Western District of Washington, sitting without a jury. The trial extended over a period of two and one-half weeks (R. 80-560).

II. The Facts as Developed by the Parties at the Trial

The testimony and exhibits produced by the parties at the trial revealed the following facts:

[2] The Pre-Trial Order indicates that the respondent actually had two theories concerning the source of its cause of action (1) Section 303 of the Act and (2) common law conspiracy (R. 11). The issue of whether respondent had a cause of action for common law conspiracy, which could be brought in a federal district court, was specified as one of the "issues of law" to be determined at the trial (R. 26). However, the case was tried solely as one arising under the provisions of Section 303 of the Act, and the findings of fact and conclusions of law entered by the trial court contain no reference to the issue of common law conspiracy.

A. The Cisco Construction Company—Cisco's Redmond and Young's Lake Projects

Respondent Cisco Construction Company is a corporation organized and existing under the laws of the State of Oregon with its principal place of business in Portland, Oregon, organized for the purpose of engaging in the general construction business (R. 4). At all times hereafter mentioned the president of the Cisco Company was Clifford T. Schiel (R. 81) and the vice-president was Andrew P. Cronkrite (R. 275).

During the period 1952 through 1954, Cisco was engaged in various construction jobs for public agencies in the States of Washington and Idaho (R. 83-85). Schiel testified that the company made a profit on these jobs in the neighborhood of $220,000.00 (R. 85). However, Cisco's income tax return for the period October 1, 1952, to July 31, 1953, showed only a net income of $3,166.45 (Def. Ex. A) and the return for August 1, 1953, to July 31, 1954, showed a net loss of $18,288.13 (Def. Ex. B).

In June, 1956, Cisco was convicted in the United States District Court for the Eastern District of Washington of the crime of filing a false claim against the government (R. 120-121, Def. Ex. C).

In 1954, Cisco was the successful bidder on certain contracts offered by the United States Army Corps of Engineers for the construction of two "Nike" (guided missile) site projects, located in the State of Washington close to the City of Seattle.[3] One project was known

[3] The dollar volume of materials purchased outside the State of Washington for use on the Cisco projects in 1954 and 1955 was at least

as the "Redmond" job and the other as the "Young's Lake" job. Each project required the construction of a "launching area" and some distance away a "control area" (R. 85-86). Cisco's bid on the Redmond job was $409,000 and its bid on the Young's Lake job was $351,000 (R. 87-88).

Approximately 75% of the work on these jobs was sub-contracted by Cisco to various subcontractors (R. 90; Plts. Ex. 5 through 31).

B. Cisco's Dispute with the Carpenters' Union — The Job Site Picketing

In September, 1951, Cisco began work on the projects (R. 92). Although it employed individuals who belonged to various unions (R. 92, 125), Cisco had never contracted with any union and was not considered a "union" contractor. It had experienced labor disputes, strikes and picketing on all of its previous jobs (R. 118-121).

Upon learning that the Cisco Construction Company was operating in the Seattle area, Harry Carr, secretary of petitioner Seattle District Council of Carpenters, and Robert Buchanan, secretary of Building Laborers Local 242 (*not a party to this litigation*), decided to visit the construction site. The first workers on new construction jobs are usually carpenters and laborers and Carr and Buchanan, the representatives of these crafts, followed the policy of introducing them-

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$300,000 (R. 86). It is conceded by the petitioners that the Cisco Company is engaged in an industry affecting commerce as those terms are defined in Section 2(7) of the Labor Management Relations Act. Appendix B, *infra*, p. 82 (R. 11).

selves to the new contractors (R. 446). Thereupon, one or both of the men paid a visit to the construction area, but neither Schiel, president and general manager of Cisco, nor Cronkite, Cisco's vice-president, were present at that time. Carr spoke to Lewis Smith, one of the supervisors, and then checked the credentials of the members of the Carpenters Union who were working on the job (R. 446-447). At least 14 carpenters were working on the project about this time. Approximately 10 of these carpenters were members of the Carpenters Union (R. 457, 489-490). Schiel was aware that there were union members working on the project (R. 92, 125).

About two weeks later Carr and Buchanan received complaints from union members working on the project that Cisco was requiring them to work Saturdays and Sundays for straight time (R. 447, 459). Carr immediately called Schiel, who was then in Portland, Oregon, and made arrangements to meet him at the construction site on Thursday, October 21, 1954 (R. 448).

Carr, Buchanan and Schiel met at the Redmond construction site on October 21st. After introductions were exchanged, Carr informed Schiel that the union members working for Cisco expected to receive the overtime, travel time and other fringe benefits that were customary in the collective bargaining contracts which the unions had with other contractors (R. 448, 459). Schiel then inquired as to the cost of such benefits and after arguing with Carr over the costs, asked what

proof the union representatives had that these benefits were customary in the construction industry. Carr replied that the Carpenters' union was a party to a collective bargaining contract with the Associated General Contractors of America, covering numerous construction jobs in the area and that such contract provided for the benefits mentioned. Schiel then asked for a copy of this contract expressing an intention to discuss it with his associates in the Cisco corporation (R. 448, 449, 459, 460). Carr handed him a copy of the Carpenters' contract with the Associated General Contractors and Buchanan, after going to his car for it, gave Schiel a copy of the Laborers' contract with the Associated General Contractors (R. 449, 460). Schiel said he would take the matter up with the other members of his firm in Portland and it was agreed that another meeting would be held on the following Tuesday, October 26, at which time Schiel would give his answer (R. 449, 460).

On the 26th, Carr and Buchanan again met with Schiel. Schiel informed the two union representatives that Cisco couldn't afford to pay the fringe benefits requested. He told them that if they could persuade the Army Engineers to reimburse Cisco for paying the fringe benefits he would make such payments. Carr replied that this was not possible. Schiel indicated again that Cisco wouldn't pay and then told Carr, "You can take your men off the job if you want to. I would like to have you leave them. If they stay, they will have to work under my conditions." Schiel asked what Carr was going to do about it and Carr replied that he would

have to take it up with his people. At no time did Carr or Buchanan ask Schiel to sign a contract with either of their unions. They were only interested in having Cisco observe the union scale including travel time, overtime and health and welfare benefits (R. 449-450, 460-461).[4]

Subsequently, the Carpenters called a strike against the Cisco Construction Company. Carr ordered that Cisco's Redmond and Young's Lake projects be picketed and a picket line was established at the Redmond project on October 28, 1954, and another picket line was established at the Young's Lake project a few days later (R. 13, 450).[5] The picket sign carried by the pickets read as follows:

> "Cisco Construction Company unfair to wages and working conditions—District Council of Carpenters A.F.L." (R. 13)

When the first picket appeared, the carpenters who were members of the Carpenters Union left the job (R. 489-490). It also appears that an undetermined number of laborers left the job at the same time (R. 127). The job site picketing continued until late in 1955, when the two projects were completed (R. 13).

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[4] At the trial, Carr and Buchanan related the foregoing version of their meetings with Schiel. Schiel disputed this version, claiming that Carr and Buchanan made a demand upon him to sign a collective bargaining contract containing an illegal union security clause (R. 92-96). The trial court, however, credited the testimony of Carr and Buchanan and found that no such demand was made (R. 558-559).

[5] The picket line was created by the petitioner Seattle District Council of Carpenters with the consent and approval of petitioner Carpenters Union Local 131 and petitioner Carpenters Union Local 1289 (R. 13-14).

C. The Effect of the Picket Line Upon the Subcontractors

Before the strike was called several of the subcontractors were at work on the job sites (R. 97).

When the strike was called and the picketing began, not only did most of Cisco's carpenters and laborers leave the job, but the subcontractors, with the exception of Schultz Electric Company (an electrical subcontractor), refused to perform any further for Cisco (R. 97). The subcontractors who were already on the construction sites pulled off and those who had yet to perform refused to do so. Either one of two things happened—in some instances the subcontractors' employees refused to cross the picket line, making it impossible for the subcontractors to perform—or, in other instances, the subcontractors voluntarily chose not to perform and made no attempt to send their men through the picket line. The evidence reveals the following with respect to the conduct of the subcontractors:

Cadman Sand and Gravel (testimony of Tor Magnussen, president):

> "We made several deliveries on the Cisco job before a picket line was established . . . (when) the picket line was established (our) driver refused to cross the picket line and returned to the plant (R. 198).
>
> * * *
>
> "Afterwards I did not attempt to send any other drivers down there." (R. 207)

Neumann Painting and Decorating (Mr. Neumann's testimony):

"We tried to (go out there to do our painting work). I took men out there, but then the men came back . . . We did endeavor to go out to the job and do our work and we discovered a picket line. My painters wouldn't cross the picket line (R. 242).

* * *

"We were not able to complete our contract because these men wouldn't go through the picket line." (R. 245)

Fryer-Knowles (testimony of Mr. Bittner, manager of floor covering division):

". . . inasmuch as we are concerned, we run a union shop and we didn't deem it advisable to send our men out to this job." (R. 211)

Acme Iron Works (testimony of Mr. Camp, supervisor):

". . . we had refused to send our truck driver with a load out to cross the picket line at their projects . . ." (R. 261)

Soule Steel (testimony of Mr. Anderson, office manager):

"Our men reported for work there on the morning when the picket line was on, and they did not go to work. * * When the picket line was put on, the men pulled themselves from the job." (R. 262-263)

Western Sand and Gravel (testimony of Mr. Smith, president):

"I will not tell my men to cross the picket line." (R. 303)

Layrite Concrete (testimony of Mr. Frese, president):

"(When the picket line was established) one of

> our salesmen told Cisco that we would not like to force our drivers to go through the picket line at the job site . . . our salesmen came back with verbal permission to alter our contract to where Cisco would pick up the material." (R. 240)

Walker Construction and Bothell Plumbing and Heating (testimony of Louis S. Smith, Cisco's assistant superintendent):

> "As I remember, Walker's crew pulled out of there completely when the strike situation developed . . . The owner of Bothell Heating and Plumbing, Mr. Del Taylor, came back there and directed work by another crew. His crew never came back on the job." (R. 493)

D. Subsequent Arrangements Made by Cisco with the Subcontractors by Which Cisco Picked Up Materials at Their Premises

When Cisco discovered that the subcontractors were not delivering and installing materials on the job sites as they had promised to do, it contacted the major subcontractors and made arrangements with them whereby the subcontractors would continue to furnish material to Cisco and Cisco, using its own trucks and drivers, would pick up the materials at the subcontractor's premises. Such arrangements were made with Cadman Sand and Gravel Company (for concrete) (R. 132, 199); Layrite Concrete Products (for concrete blocks) (R. 240); Western Sand and Gravel Company (for concrete, gravel and sand) (R. 304, 307-308); Soule Steel Company (for reinforcing steel) (R. 262-263).

and Acme Iron Works (for certain metal work). (R. 261).

Thereafter, when Cisco undertook to pick up materials at the premises of these subcontractors, agents of the petitioners attempted to persuade the employees of the subcontractors not to load materials on the Cisco trucks.[6] The record reveals that the following incidents took place:

1. *Cadman Sand and Gravel Company*

On November 5, 1954, about a week after the job site picket lines were established, Cisco began picking up concrete at the Cadman Sand and Gravel Company plant, using leased trucks (R. 99, 133, 199). When Harry Carr, agent of petitioner Seattle District Council of Carpenters, discovered that Cisco was hauling concrete from Cadman's to the job sites, he called the union's attorney and then decided to put a "roving picket line" on Cisco's trucks, i.e., have the pickets follow the trucks and picket them wherever they went (R. 200, 152). Picketing of this kind took place at Cadman's, when Cisco trucks appeared there on November

[6] Agents of the petitioners and agents of other unidentified unions also made direct appeals to the subcontractors, asking them not to furnish materials to Cisco (R. 228-229, 251-252, 259, 261, 263, 301). The secondary boycott provisions of the Act, however, only proscribe inducements directed to *employees*. Appeals and threats made directly to *employers* are not unlawful. See: *Local 1976, United Brotherhood of Carpenters, et al., v. N.L.R.B.*, 357 U.S. 93 (1958); *Rabouin v. N.L.R.B.*, 195 F.2d 906, 911 (2nd Cir. 1952); *Schatte v. International Alliance*, 182 F.2d 158 (9th Cir. 1950), cert. denied, 340 U.S. 885; *Studio Carpenters Local 946 v. Loew's Inc.*, 182 F.2d 168 (9th Cir. 1950), cert. denied, 340 U.S. 828. In any event, no damage flowed from the appeals and threats to the subcontractors. Uniformly, the subcontractors refused the appeals made by the petitioners and, continued to furnish materials to respondent.

5, 9 and 11, 1954 (R. 13). The pickets wore the same banners as used on the job sites (R. 43).

After the roving picket line was established, Carr went up into the hopper (i.e., the place from where the trucks are loaded, also known as the batching plant) and spoke to Frederick Forcier, the employee working there. Forcier was a former member of the Teamsters' Union and had made application for membership in petitioner Operating Engineers' Local 302 (R. 156). Carr told him that the Carpenters had a roving picket line on the Cisco Company. Not knowing what to do, Forcier placed a call to Russell Conlon, secretary of petitioner Operating Engineers' Local 302. Forcier asked Conlon what he should do about loading Cisco trucks, and Conlon replied it was up to him (R. 158). After the phone call, Forcier spoke to his employer, Tor Magnussen, the president of the Cadman company, telling Magnussen that he got the impression that his union did not want him to load Cisco trucks (R. 163). Magnussen then called Conlon and, following the call, told Forcier that Conlon had not ordered him to stop work and directed him to finish his work (R. 162-163, 201). Forcier then returned to the batching plant and loaded the Cisco trucks (R. 158, 162).

Later in the same day, November 5, 1954, Al Crowder, a business agent of petitioner Teamsters' Union Local 174, called Magnussen and told him that the Operating Engineers were coming out the next day to instruct Forcier not to load Cisco trucks (R. 12, 201). Crowder also talked to Forcier, telling him that the conversation was being tape recorded and suggesting to him that he

should go home and threatening him with the loss of his Teamster withdrawal card (R. 160). Forcier replied that he would take his instructions from the Engineers' Union, and not from the Teamsters (R. 164).

Although there was a delay of an hour and a half, at the most, on November 5, during the period that Forcier was determining what to do (R. 102, 133, 165) the waiting Cisco trucks were loaded (R. 103, 158, 162) and there was no further delay in loading, either on this day or on any of the subsequent days in which the roving picket line appeared at the Cadman plant (R. 162, 201). Cisco received all the concrete that it had ordered for that day (R. 162).

On or about November 8, 1954, three employees of Cadman (Downs, Cotterill and Pearson, members of petitioner Operating Engineers, Local 302) were approached by "Jiggs" Abbott, a business agent employed by Local 302. Each of these employees testified that Abbott requested them to come across the road and talk to him the next time the roving picket appeared (R. 187, 192, 195). However, none of these men interpreted this request as being a demand that they leave the job (R. 190, 193, 197), and when the picket subsequently appeared, none of the men bothered to "cross the road." They continued to perform their duties (R. 187, 193, 195-196).

On or about November 11, 1959, James Harrison, a business agent of petitioner Teamsters' Union, Local 174, and Conlon of petitioner Operating Engineers' Local 302, met with the Cadman employees in the repair

shop, during their lunch period (R. 466-467). What was said at this meeting is very much in dispute. Schiel, president of Cisco, claims that he was in Cadman's main office with Magnussen, president of Cadman, and Magnussen's partner, during this particular noon (R. 103-104). He testified that he overheard much of Harrison's remarks to the employees over an intercom system which connects the repair shop with the main office (R. 104). Schiel's story is that Harrison told the employees he didn't want them to be making deliveries of concrete to Cisco, and threatened those who didn't cooperate with being "run up on the carpet" (R. 105). One of the employees in the meeting also testified that Harrison told the employees that they couldn't go through the picket line (R. 188). On the other hand, Magnussen, who was present in the same room with Schiel, did not hear Harrison threaten the employees or urge them not to load Cisco trucks (R. 204, 210). Harrison, when asked about the matter, flatly denied that he instructed the employees not to go through the picket line or that he made any threats in connection therewith (R. 467).*

Conlon apparently played a very small part in this meeting. Schiel makes no claim that he overheard any statements made by Conlon on the intercom and the employees who were present at the meeting testified only that Conlon made a statement that "we are having a tough time making Cisco conform to the Union" (R.

*The trial court made no ruling or finding indicating which version of this incident was credited by it.

188, 197). Conlon did not ask the men to do anything about this situation (R. 197).

Following the November 11 meeting, the employees of Cadman immediately returned to work and continued to work thereafter. In the words of Mr. Magnussen, president of the Cadman Company, "all of the employees performed all of their normal work after that meeting" (R. 210) or, as one of the employees put it, "the men were in favor of sticking with the company and continuing to work. They did continue to work. There was no work stoppage at the Cadman plant" (R. 190). Schiel, who eavesdropped on the meeting, admitted that the employees returned promptly to work at the normal time after the meeting (R. 153) and that there was little delay, if any, in the loading of Cisco trucks (R. 140, 474).

All of the foregoing incidents had no substantial effect on the work performance of the Cadman employees. There was a delay of not more than an hour and a half on November 5 during the time some phone calls were made (R. 102, 143). However, the waiting trucks were loaded (R. 103, 161-162), and on all other occasions Cadman furnished concrete to Cisco without delay or interruption (R. 201). Cisco got all the concrete that it wanted or that was called for by the terms of the subcontract (R. 206). Cisco incurred added expense because it had to haul this concrete itself, but this expense was charged back to Cadman under the terms of the subcontract (R. 133, 206).

2. *Layrite Concrete Products*

On or about November 29, 1954, after Cisco started to pick up concrete blocks at Layrite Concrete Products, three employees of Layrite (James Thurman, William Quinnett and William Larkin, all of whom were members of petitioner Laborers Union Local 440) were engaged in conversation by Ed Lucero, an assistant business agent of Local 440. Lucero told them that the Cisco Company was involved in labor difficulty and asked them not to load Cisco trucks, threatening them with union disciplinary proceedings if they refused (R. 214-217, 222-223). The men promised to do as requested but Mr. Baumgartner, a company officer, told them that Layrite had a contract with Cisco to furnish material and if they refused to load the trucks they would be fired (R. 219, 224). The men chose to continue working and there was no work stoppage or refusal to load Cisco trucks (R. 218-219, 224).

On that same day, November 29, Vern Frese, president of Layrite, also learned of Lucero's visit to the plant and his threats to the employees. He thereupon telephoned Lucero's superior, James V. Sauro, secretary-treasurer of petitioner Laborers Local 440 (R. 229, 233). Frese told Sauro about Lucero's activities among his employees and inquired as to the official policy of the union. Frese claimed that Sauro indicated that he would investigate the situation (R. 229, 233). Sauro's version of the conversation is that he immediately repudiated Lucero's conduct and explained that there was to be no work stoppage involving Layrite employees. On November 30 another conversation was had between

these two men. At this time, Sauro said there was to be no work stoppage (R. 231, 232, 480).

On December 7, 1954, Sauro sent Lucero to the Layrite plant to explain the Union's position (R. 481-482). At that time Lucero informed the Layrite management and its employees that the Union did not want any work stoppage and there was to be no interruption in the loading of Cisco trucks. He retracted his previous statements to the contrary (R. 219, 220, 225, 235).

There was no interruption of work schedules at the Layrite plant. Schiel, president of Cisco, testified that at some time in early December there was a delay of an hour or so in the loading of one of his trucks at the Layrite plant and that there were other delays (R. 112, 150-151). Schiel made no explanation of why such delays occurred nor could he recall the date when they occurred (R. 151). Frese, president of Layrite, could not recall any such delays:

> "Q. And was there any work stoppage as far as loading of those trucks is concerned?
>
> A. Not to my knowledge.
>
> Q. Well, now, Mr. Frese, if there had been any delay in loading of the Cisco trucks, would you have known about it?
>
> A. I am sure that I would have. Now, it depends on what you mean by 'delay.' Sometimes a driver will come in with a truck and go up to the office for a ticket, and the truck may sit there for a few minutes while he is getting his invoice and orders straight, but I would say there was no delay other than the normal loading operation." (R. 234)

Layrite continued to furnish concrete blocks to Cisco over a period extending several months beyond any of the aforesaid incidents (R. 236). Adjustments were made in Layrite's subcontract price because of the added expense to Cisco in having to pick up the concrete blocks at Layrite (R. 136).

3. *Western Sand and Gravel Company*

The Western Sand and Gravel Company had a subcontract with Cisco to furnish and deliver concrete to Cisco's Young's Lake project (Pl. Ex. 8). When the job site picket line appeared at Young's Lake, the president of Western Sand and Gravel, Paul H. Smith, decided that he would not tell his truck driver to cross the picket line (R. 303). Thereafter, either Smith or his partner Charles Panchek would drive the trucks and deliver the concrete (R. 303-309). On some occasions Western's truck driver, Lawrence Ward, would drive a truck as far as the picket line and then Smith or his partner would drive it across and make the delivery (R. 303). In addition to the furnishing and delivery of the concrete under the terms of the subcontract, Western entered into a supplemental contract with Cisco by which it agreed to furnish some road gravel and other material (R. 307). These materials Cisco picked up at the Western plant in its own trucks and with its own employees (R. 304, 308).

On November 15 or thereabouts a picket appeared in front of the Western plant for about one and a half to two hours (R. 14, 248, 303, 309). Smith believes the picket carried the same sign as that used by the

Carpenters Union at the Cisco job but he does not recall that there were any Cisco trucks or other equipment with Cisco personnel present when the picket was there (R. 303). The picket appeared during the noon hour and was observed by Lawrence Ward, the truckdriver. When Ward returned from lunch, the picket was gone (R. 248). The picketing had no effect on the performance of work at the Western plant. Ward testified:

> "There was no work stoppage during the time that this picket was present. . . . None of the employees refused to perform their normal work as a result of the picket being there. I don't know of any other effect this picket had on the work that was performed by the employees." (R. 249-250)

and Mr. Pauchek testified:

> "Q. Did the picketing have any effect upon the normal performance of the duties of your employees?
>
> A. No, they never." (R. 253)

4. *Soule Steel Company*

Sometime after Cisco starting picking up reinforcing steel at the Soule Steel Company plant, an unidentified union agent called on Vern Anderson, the company's district manager, and suggested that the company cease delivering to Cisco, hinting that, otherwise, there might be a picket line placed around his plant. Anderson replied that the company had a contract with Cisco and that it intended to live up to the contract (R. 263).[1] No picket line was ever established and work at

[1] At the trial, petitioners moved to strike this testimony, relating to an unidentified union representative, but the trial court made no specific ruling on the motion (R. 557).

the Soule Steel plant was not interrupted. Employees at the plant did not cease work, nor did they refuse to load Cisco trucks (R. 264).

The increased costs to Cisco, resulting from Cisco's having to pick up the steel at the Soule Steel plant, were deducted from the subcontract price (R. 136, 265).

5. *Acme Iron Works*

Sometime early in November, 1954, a Cisco truck was being loaded at the Acme Iron Company. An employee by the name of Dell Earl Peeler was supervising the loading (R. 256). Two men came up to Peeler, one of them identifying himself as being from the Teamsters Union and the other from the Operating Engineers, and they made reference to the Cisco Construction Company and the fact that it was being picketed. They suggested to Peeler that Acme refuse to load the Cisco trucks (R. 257). Peeler could not identify the men, nor the locals they represented (R. 258-259). On this same occasion Luther Camp, an official of Acme Iron Works, talked to these two men (R. 260). They asked if Acme would cooperate by not loading trucks. While on the premises, these men also entered Acme's fabricating shop and apparently talked to employees there (R. 259). Camp had no recollection of the men's names or of what union they represented (R. 260).[10]

The plea of these two unidentified union officials that the employees of Acme cease loading Cisco trucks had

[10] At the trial, the appellants moved to strike the foregoing testimony relating to the unidentified union representatives, but the trial court made no specific ruling on the motion (R. 557).

no effect whatsoever. The Acme employees continued to load the Cisco trucks as they had done before. Peeler testified:

> "Q. The loading went on, however, did it not?
>
> A. Yes.
>
> Q. There was no interruption in the loading?
>
> A. The loading went on." (R. 259)

Completion of the Projects—Cisco's Damages

Cisco claimed that the union picketing at the job-sites caused the subcontractors not to perform and created financial difficulty for the company. In the words of Mr. Schiel, president of Cisco:

> "The picketing produced a most serious and difficult financial problem. Failure of our subcontractors to perform required us to assume and take over the performance of their work, as we had a prime contract with the government and a time schedule to meet with penalty clauses in the contract if we failed to complete the job on time. So we had to perform and take over the additional overhead expenses and procurement of labor, materials and equipment, as well as supervision, and the installation and performance of their entire subcontracts." (R. 115)

One of the major expenses said to have taxed the financial resources of the company was the increased payroll it had to meet when it took over the work of the subcontractors (R. 115).

Within a few months after the picketing began, Cisco's financial condition became so involved that the United States Fidelity and Guaranty Company, which

had issued performance bonds insuring Cisco's completion of the projects was required to assume administrative and financial control (R. 115, 167, 168). The bonding company assumed control on February 1, 1955 (R. 155, 284, 285) and under its supervision, the projects were finally completed late in 1955, and accepted by the Corps of Engineers (R. 13, 505-506). Although the projects were completed several months behind schedule, no penalties were assessed by the government (R. 508).

Cisco attributed all of its financial difficulty to the alleged unlawful conduct of petitioners. However, there was testimony indicating that other matters in addition to the "labor difficulty" contributed to the delay in completing the projects and increased Cisco's costs and expenses. There was testimony indicating that a major subterranean water problem developed at the Redmond site causing considerable expense and delay. The water was greatly in excess of what anyone had anticipated (R. 490-491). The excess of underground water and the poor type of soil on the project produced a type of quicksand and made quagmires of the excavation. A. Schiel explained:

> "... the material was such that if a man walked out into it, why he became quickly mired and had to be either rescued or fight his way out, if he could, and no equipment could operate in the holes." (R. 111)

It was estimated that the subterranean water problem, if it had existed apart from the other difficulties, would

have delayed the completion of the Redmond project approximately 90 days (R. 111, 293).

There was other testimony to the effect that the type of construction undertaken was a new experience for Cisco and that other contractors working on the same type of project had also experienced delay (R. 507, 508). There was also testimony indicating that Cisco attempted to perform with inexperienced foremen, superintendents and personnel and that it used inadequate equipment and materials (R. 486, 489, 496, 503, 505, 509, 510).

Cisco's major emphasis in proving damages was in stressing the additional expenses it incurred on the two projects over and above the expenses contemplated in the original contract bids. Although the general practice in the construction industry is to maintain job cost records (R. 383, 384, 553, 554, 512), Cisco kept no such records (R. 127, 341, 342, 376). The expenses incurred on the various projects undertaken by the company, as well as income received, were commingled in a general ledger (R. 342). Thus, Cisco was unable to present from its own records any precise accounting of the expenses it incurred on the Redmond and Young's Lake projects beyond those originally contemplated in the bids submitted to the government. However, working from the records of the bonding company, Cisco's accountant prepared a "Job Cost Summary—Young's Lake and Redmond Contracts" (R. 349, Pl. Exhibit 41). This document purported to be a breakdown of the expenditures incurred on the two projects beyond those contemplated in the original bids (R. 357). It indicated

that Cisco incurred an additional expense on the Young's Lake project of $214,264.35 and on the Redmond project of $48,420.26 (Pt. Ex. 41).

Exhibit 41 was based, in part, on material taken from respondent's Exhibit 40, which purported to be a compilation of receipts and disbursements on all Cisco's projects during 1955 (R. 169). Both these exhibits, together with another exhibit, were offered in evidence at the same time (R. 348-349). Petitioners objected to the admission of Exhibit 40, on the grounds that its authenticity hadn't been established, that it was prepared by some other than the witness who explained it, that the person who prepared the document was not called to testify, and that it was not the best evidence (R. 350-352). Petitioners made the same objection to Exhibit 41, as it was based on Exhibit 40 (R. 351). The trial court, while admitting that it was "in doubt" as to the ruling, overruled the objections and admitted the exhibits in question (R. 352-353).

Upon cross-examination, Cisco's accountant admitted that there were several inaccuracies and omissions in Exhibit 41 (R. 396, 399-402, 435-437, 440). He was unable to give any explanation for some of the items listed (R. 435, 436).

III. Events Following the Conclusion of the Trial—the Trial Court's Findings of Fact, Conclusions of Law, and Judgment

At the conclusion of the trial, the trial court indicated it was in some doubt as to the proper construction of the Taft-Hartley Act, and the cases interpreting

it (R. 29). The court ruled, however, that the initial job site picketing was legal, but that, thereafter, the petitioners apparently engaged in activities proscribed by the Act (R. 31). The court then asked the respondent to submit a memorandum: (1) pointing out what direct evidence there was that petitioners engaged in unlawful activities looking toward the termination of the subcontracts, and (2) suggesting what the evidence warranted with respect to a damage award for the increased cost of performance sustained by respondent as a result of the termination of the subcontracts (R. 31). In response to this request, respondent submitted a lengthy memorandum (R. 32-55).

On the issue of liability, respondent's main emphasis was on the fact that the National Labor Relations Board, in unfair labor practice proceedings, had found petitioners in violation of Section 8(b)(4) of the Act because of their activities on the premises of the subcontractors, and had ordered them to cease and desist from such activities. *Seattle District Council of Carpenters*, 114 NLRB 27 (1955) (R. 34-38). Respondent also argued that the job site picket lines, even though found by the trial court to be legal, were so commingled with other illegal acts of petitioners, as to become illegal (R. 33-34).

On the issue of damages, therefore, respondent urged that petitioners were responsible *for all* of the additional expenses incurred by respondent because of the non-performance of the subcontractors on both projects. Respondent did not segregate the additional expenses incurred as a result of the job site picket lines, from

the additional expenses, if any, which resulted from the other activities of petitioners (R. 44-49). To support its claim for damages, respondent submitted two revisions of Exhibit 41. It explained that these revisions were prepared, *following the trial*, because of the number of errors in the exhibit as originally submitted (R. 46-48). One of these revised exhibits indicated that the respondent incurred additional costs of $180,981.47 in completing the two projects (R. 51), and the other revised exhibit indicated that the additional costs were some $193,064.47 (R. 52).

On December 29, 1958, the trial court entered a memorandum decision in which it re-affirmed its previous oral ruling that the initial job site picketing, and the roving picketing as well, was legal. The court noted that if the petitioners had confined themselves to this picketing there could be no recovery. However, the court held that the petitioners had subsequently engaged in secondary boycott activities and that the conduct of the petitioners had brought about the non-performance of the subcontracts. The court did not detail the activities of petitioners found by it to be unlawful, stating that these activities were set forth in the National Labor Relations Board decision. Similarly, the court did not detail the elements of damage, but simply held that the activities of petitioners put respondent to an expense of "at least $75,000 above the subcontract cost" on the two projects (R. 56-59).

On February 21, 1959, the trial court entered find-

ings of fact, conclusions of law, and a judgment.[1] The court found that the petitioner Carpenters had, as a result of a dispute with the respondent over the payment of wages and fringe benefit to its employees, caused a picket line to appear at respondent's job sites, and also caused a roving picket line to follow respondent's trucks (Finding No. V). Then the court found as follows:

"VI.

"That after said picket lines had been established, the defendants through their respective representatives, usually operating in pairs, contacted plaintiff's subcontractors and their employees, instructing them not to load trucks or otherwise render any services for or on behalf of plaintiff and uttering or implying threats of reprisals to said employees if they should do so; that the conduct of defendants by their agents directed at plaintiff's subcontractors and their employees is set forth in detail in the reported National Labor Relations Board decision, Seattle District Council of Carpenters, et al., and Cisco Construction Company, 114 NLRB 27, Case No. 19-CC-72, dated September 9, 1955, which said findings in said decision and report are adopted by this Court herein and by this reference are made a part of these findings of fact; that said activities included, among others, the following:

"(1) On several occasions, representatives of defendants contacted employees of Cadman Sand and Gravel Co., a subcontractor of plaintiff, and in-

[1] The trial court's findings of fact and conclusions of law were not included in the printed record below. However, the original findings and conclusions, which were part of the certified record in the court below, have been appropriately certified to this court.

duced and encouraged them to engage in a concerted refusal in the course of their employment to perform any services for plaintiff as provided in said subcontract and particularly to load plaintiff's trucks, and all of said trucks of plaintiff were loaded without hindrance or delay with the exception of a delay between one-half hour and one hour on November 5, 1954;

"(2) That a representative of the defendant Local 440 contacted employees of the Layrite Company, a subcontractor of plaintiff, and induced and encouraged them to engage in a concerted refusal to perform any services, to-wit, to load plaintiff's trucks, as required by said subcontract, nonetheless all of said trucks of plaintiff were loaded without hindrance or delay;

"(3) On several occasions, representatives of defendants contacted employees of Western Sand & Gravel Company, a subcontractor of plaintiff, and induced and encouraged them to engage in a concerted refusal in the course of their employment to perform any services for plaintiff as provided in said subcontract and particularly to load plaintiff's trucks.

"VII.

"That the conduct of the defendants above referred to was carried on at least in part to force the plaintiff's subcontractors, as secondary employers, to cease doing business with the plaintiff by inducing and encouraging their employees to engage in a concerted refusal to work.

"VIII.

"That the activity engaged in by each of the defendants was part of a joint course of action par-

ticipated in by all of the defendants. Said defendants were not acting as strangers to one another, but were engaged in a joint course of action to accomplish their common purpose.

"IX.

"That the concerted activities of the defendants herein referred to contributed substantially, directly and proximately to the non-performance of plaintiff's subcontracts by the subcontractors.

"X.

"That as a result of the concerted activities of the defendants and the intended consequent failure of plaintiff's subcontractors to perform their subcontracts, plaintiff was required to and did perform the work contemplated by said subcontracts; that in performing said work, the plaintiff was required to provide in whole or in part the services and materials defaulted under the subcontracts, and was put to an expense therefor of at least $75,000.00 above the subcontract cost; that plaintiff has thereby suffered damage in the sum of at least $75,000.00."

The court concluded, from these findings, that the initial job site picket lines, and the roving picketing, was not unlawful (Conclusions Nos. III and IV); that the efforts of the petitioners to induce the employees of the subcontractors to cease work for the purpose of causing the subcontractors to cease doing business with the respondent violated Sec. 8(b)(4)(A) and Sec. 303(a) of the Act and that these efforts were the proximate cause of the refusal of the subcontractors to perform (Conclusion No. V); and that respondent was

entitled to damages of $75,000.00 against the petitioners, and each of them (Conclusions Nos. VI and VII).

The trial court then entered a judgment in favor of respondents and against the petitioners, jointly and severally, in the amount of $75,000.00 plus costs (R. 62).

IV. Appeal to United States Court of Appeals for the Ninth Circuit—the Court's Opinion and Judgment

Upon the entry of the judgment, petitioners prosecuted an appeal to the United States Court of Appeals for the Ninth Circuit (R. 68).

In the court below, petitioners advanced the following main arguments: (1) That the trial court's findings of fact were vague and indefinite and that the case should be remanded with instructions to prepare new findings. Petitioners urged that the trial court did not make clear whether it was holding petitioners responsible solely for the damages which flowed from their activities on the premises of the subcontractors, or whether it was holding them responsible for the damages resulting from the job site picketing. (2) That the trial court erred in admitting certain evidence, particularly in admitting respondent's Exhibits 38, 40 and 41 under the provisions of the Federal Shop Book Rule Act. (3) That the trial court erred in adopting the findings made by the National Labor Relations Board in a separate proceeding, and (4) That the trial court erred in awarding $75,000.00 in damages to respondent because petitioners' secondary boycott activities on the premises of the subcontractors were clearly severable from the job site picket lines, and there is no evidence

that these activities caused any damage to the respondent.

On April 13, 1959, a three-judge panel of the court below, in an opinion by Circuit Judge Chambers, rejected petitioners' contentions and affirmed the judgment of the trial court (R. 565-572); Appendix A, *infra*, pp. 71-81).

The court below held that it was not necessary to return the case for improved findings by the trial court as, in the court's view, it seemed apparent that the trial court intended to hold petitioners liable "not for actual damage from the activities away from the job site but because of difficulties mainly behind the picket line." What the trial court did, said the court below, was permit a recovery on the theory that petitioners' conduct could be "totalized," i.e., the illegal activities of petitioners on the premises of the subcontractors were considered to "infect" the job site picket lines, which were originally lawful, so as to render petitioners responsible for all the damage which resulted (R. 569; Appendix A, *infra*, pp. 76-77).

The court below acknowledged that the activities away from the job sites, if considered separately from the job site picketing, caused no substantial damage. The damage which Cisco suffered was caused by the job site picket lines. Thus, the court framed the main question in the case as "whether we may take a concept of the totality of effort, charging all damage to (petitioners)?" (R. 566-567; Appendix A, *infra*, p. 73).

To answer this question, the court below looked solely

to four decisions of this Court, all four decided in the October term, 1950: *NLRB v. International Rice Milling Co., Inc., et al.*, 341 U.S. 665; *NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675; *International Brotherhood of Electrical Workers v. NLRB*, 341 U.S. 694; and *Local 74, United Brotherhood of Carpenters and Joiners of America v. NLRB*, 341 U.S. 707. After reviewing these decisions, the court below concluded that the petitioners could be judged by their total activity, provided only that the illegal activity is not *de minimis* (R. 567, Appendix A, *infra*, p. 73). The court also held that there was sufficient evidence in the record from which it could be concluded that the job site picket lines, which were initially lawful, were thereafter "spoiled" by the activities which occurred on the premises of the subcontractors (R. 569-571; Appendix A, *infra*, pp. 78-79). The court was careful to point out that its holding rested upon the four decisions of this court, cited *supra*, and that it could be in error.

Said the court:

> "Of course, if the activities of the (petitioners) must be strictly compartmentalized and the activities treated as wholly severable, then this court could be wrong." (R. 570, Appendix A, *infra*, p. 77.)

With respect to the admission of respondent's exhibits 38, 40 and 41, the court held, without elaboration, that the exhibits were admissable within the shop book rule (R. 572, Appendix A, *infra*, p. 80).

With respect to the trial court's adoption of the findings made by the National Labor Relations Board, the

court below saw no error in such a practice for, in its view, the trial court did not accept the findings as *res judicata* but simply "as a shorthand method of relating that it too found the same thing." (R. 572, Appendix A, *infra*, pp. 80-81).

On the same day that the court below filed its opinion, April 13, 1959, it also caused a judgment to be entered affirming the judgment of the trial court (R. 573, Appendix A, *infra*, p. 81). This petition for a writ of certiorari follows.

V. Proceedings Initiated by the National Labor Relations Board

While they are not part of the record in this case, the proceedings initiated by the National Labor Relations Board against the petitioners have a bearing on the issues here involved and, accordingly, we set forth the following summary of those proceedings:

On or about December 1, 1954, a little more than a month after the job site picketing began, Cisco filed an unfair labor practice charge with the 19th Regional Office of the National Labor Relations Board at Seattle, alleging that petitioners had violated Section 8(b)(4)(A) of the Act.

On December 2, 1954, the Regional Director filed a "Petition for an Injunction Under Section 10(1) of the National Labor Relations Act, as amended" in the United States District Court for the Western District of Washington, Northern Division. *Graham v. Seattle District Council of Carpenters, et al.*, Cause No. 3834

(unreported). In this petition, the Regional Director alleged that the "roving picketing" of petitioner Carpenters at the premises of the Cadman Sand & Gravel Company and the Western Sand & Gravel Company; and the appeals and inducements made by the other petitioners to the employees of the subcontractors were unlawful. The petition prayed for a temporary injunction against the petitioners, prohibiting them from engaging in this activity pending a final adjudication by the National Labor Relations Board.

This petition did not allege that petitioner Carpenters job site picket lines were in themselves unlawful or were made unlawful by the other activities of petitioners and it sought no injunctive relief against such picket lines. During the hearing the attorneys for the Board conceded that this picketing was lawful.[12]

On December 16, 1954, a hearing was held on the Regional Director's petition for an injunction before the Honorable John C. Bowen, one of the judges of the United States District Court for the Western District of Washington. All parties were represented by counsel and witnesses were called and examined under oath. It was the position of the unions at this hearing that they had all ceased the activities complained of in the Board's petition and that, accordingly, no cause existed for the issuance of any interlocutory injunction pending the

[12] The Board's "Supplemental Memorandum of Points and Authorities" submitted to the court contains the following statement. "As was conceded by counsel for petitioner at the hearing, we do not contest the legality of the basic strike against Cisco or of the picketing of Cisco at the Redmond and Young's Lake construction sites by respondent Carpenters."

Board hearing in the matter. At the conclusion of this hearing the District Court ruled as follows:

> "... the court feels unquestionably convinced that these respondents, most of them before and all of them since this action, have, as soon as they became finally advised of the serious consequences of their action and of the doubt as to the legality of it, in good faith brought an end to the complained of actions, and that good faith conduct on the part of these respondents has brought about a moot condition as to the issues."

Appropriate findings of fact, conclusions of law and a judgment and decree dismissing the petition were signed by the District Court on December 29, 1954. The findings of fact recite that the unions had ceased doing or committing all of the acts and things complained of in the Board's petition and that there existed no present danger or threat of such acts being done or repeated prior to such time as the Board would have an opportunity to hear and determine the issues presented.

Although it did not obtain an interlocutory injunction, in the 10(l) proceeding, the Board continued in the ordinary way with the unfair labor practice proceeding against petitioners.[13] A formal complaint issued on December 6, 1954, which, like the petition for an injunction, alleged that the unions had violated the Act by engaging in roving picketing and by making appeals to

[13] Because of the possibility of "recurrent violations," the Board usually processes an unfair labor practice case to conclusion and issues a cease and desist order, even though, as in this case, the respondents have long since ceased their illegal activities. *Prudential Insurance Company*, 119 NLRB 768, 769 (fn. 3) (1958). This court has seemingly approved this practice. *Local 1976, United Brotherhood of Carpenters et al. v. NLRB*, 357 U.S. 93 (fn. 6) (1958).

the employees of the subcontractors. This complaint did not allege that the job site picketing was illegal or that it became illegal because of the other activities of the petitioners.

A hearing was held on the allegations of this complaint on several days between December 20, 1954, and January 11, 1955, before a trial examiner of the Board. On March 25, 1955, the trial examiner issued an intermediate report and recommended order in which he found petitioners guilty of violating Section 8(b)(4)(A) of the Act by their conduct as alleged in the complaint. The National Labor Relations Board was asked by petitioners to review this intermediate report and, after such a review, the Board issued is decision and order on September 9, 1955.

The Board agreed with the trial examiner that petitioners had violated the Act by the following conduct: (a) the "roving picketing" of petitioner Carpenters; (b) the attempts by Abbott, agent of petitioner Operating Engineers, to get Cadman employees to "cross the street" when the roving pickets appeared; (c) the attempts by Lucero, agent of petitioner Laborers Union, to persuade Layrite employees not to load Cisco trucks; (d) the suggestion by Crowder, agent of petitioner Teamsters, to Forceir, an employee of Cadman, to go home.

The petitioners were ordered by the Board to post notices stating that they would cease and desist from such activity.

The Board did not find that the job site picketing was

unlawful, or that it became unlawful as a result of the secondary activities of petitioners, and the petitioner Carpenters was not ordered to cease and desist from such picketing.

The Board's decision and order, together with the trial examiner's intermediate report, is reported as *Seattle District Council of Carpenters, et al.*, 114 NLRB 27 (1955).

REASONS FOR GRANTING THE WRIT

1. This Case Raises Important Questions Relating to the Scope and Application of Section 303 of the Labor Management Relations Act

As the facts of this case reveal, the Respondent Cisco Construction Company refused, in the fall of 1954 to pay its carpenters, most of whom were members of the Carpenters' Union, the wages, hours and working conditions prevailing under union contract in the area.[4] As a result, petitioner Seattle District Council of Carpenters called a strike against the respondent and, in furtherance of this strike, established picket lines at the respondent's two construction sites. These picket lines were established on or about October 28, 1954, and remained until the completion of the projects late in

[4] The Court below noted, "As to Cisco, none of the defendants was a bargaining representative as defined by the Taft-Hartley Act." App. A, *infra*, p. . This is incorrect. None of the defendants had been officially "certified" by the National Labor Relations Board to represent Cisco's employees (R. 13) but a majority (10 of 14) of the carpenters working on the job were members of the Carpenters Union (R. 457, 489-490). Thus, the Carpenters would be entitled to act as "bargaining representative" for these employees, under the provisions of the Taft-Hartley Act, even though it did not have a formal certification by the National Labor Relations Board. *United Mine Workers of America v. Arkansas Oak Flooring Company*, 351 U.S. 62 (1956).

1955. The maintenance of these picket lines caused harm to the respondent. Not only did respondent's union carpenters leave the job but the employees of some of the subcontractors refused to cross the picket lines. In other instances, the subcontractors themselves refused to order their men to cross the picket line. The failure of the subcontractors to work on the construction sites forced the respondent to undertake their work, and thus thrust an additional financial burden upon it.

After the job site picket-lines were established, Cisco made arrangements to pick up materials at the premises of some of the subcontractors. When this project got underway, agents of the petitioners made various appeals to the employees of these subcontractors, urging them not to load Cisco trucks with materials. These appeals, however, were totally ineffective, and caused no harm or ascertainable damage to the respondent or to the subcontractors. These appeals took place during a one month period, from approximately November 5, 1954, to December 7, 1954. Petitioners conceded below, and concede here, that these activities constituted an attempt to "induce . . . the employees (of the subcontractors) to engage in . . . a concerted refusal in the course of their employment to . . . handle or work on any . . . materials . . . . (with an object in view of) forcing or requiring . . . (the subcontractors) to cease doing business with (the respondent)" and were thus illegal "secondary boycott" activities proscribed by Section 8(b)(4) and Section 303 of the Act. App. B., *infra*, pp. 82-85. Indeed, the National Labor Relations

Board found, in an unfair labor practice proceeding, that these activities had violated the Act.

After the construction jobs were completed, and after the National Labor Relations Board announced its findings in the unfair labor practice proceeding, the respondent brought this action for damages under Section 303.

In its findings of fact and conclusions of law, the trial court held that the initial job site picketing by petitioner Carpenters was not unlawful. The activities specifically found by the trial court to be unlawful were those secondary activities which took place subsequent to the establishment of the picket lines and which the National Labor Relations Board had found to be illegal. Instead of detailing these activities, the trial court simply adopted the Board's findings. The court concluded, however, that respondents were entitled to a judgment of $75,000 against petitioners, jointly and severally.

These findings and conclusions do not, in petitioners' view, make clear whether the trial court was assessing $75,000 in damages for the so-called secondary activities of petitioners on the premises of the subcontractors or whether it was assessing $75,000 in damages for the injury caused by the job site picket lines.

In the view of the court below, however, the trial court's findings and conclusions are sufficiently clear. What the trial court did, says the court below, is find that the job site picketing, which was admittedly lawful when established, *became* unlawful as a result of

the secondary activities of the petitioners.[15] It was a matter of the secondary activities "infecting" the job site picket lines and thus rendering the petitioners liable for the damage which flowed from the job site picket lines. Relying entirely upon its analysis of four prior decisions of this court, the court below held that the trial court properly considered the secondary activities of the petitioners to "infect" or "spoil" the job site picket lines.

We submit that the holding of the court below raises important questions relating to the scope and application of Section 303, and of its companion section, Section 8(b)(4), of the Act. It had been uniformly considered, until this case, that a job site picket line, directed at the employer with whom the union has a dispute, is lawful concerted activity and does not constitute a secondary boycott proscribed by the Act.

The holding of the court below is not justified or supported by prior decisions of this court. This court has never applied the theory that a lawful primary picket line can, *ipso jure*, become unlawful simply because the union involved also engages in other conduct, away from the picket line, which constitutes secondary boycott activity.

The holding of the court below conflicts squarely with

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[15] Petitioners note, however, that nowhere in the trial courts' findings or conclusions does it specifically hold that the job site picket lines *became* illegal or that petitioners were liable for the damage flowing from this picketing. It is entirely possible that the trial court intended only to award damages for the injury flowing from the secondary activities of the petitioners. For this reason, petitioners still believe that the case should have been remanded for the entry of more explicit findings.

the position taken by the National Labor Relations Board in this case, and in similar cases. The Board in this case took the position that the job site picket lines were legal and that they were entirely severable from the other activities of petitioners, proscribed by the statute. If the holding of the court below is to stand, the Board will be divested of its primary responsibility for the interpretation and application of the National Labor Relations Act.

The holding of the court below will do incalculable harm to the labor movement in this country. In almost every labor dispute involving a primary picket line there is bound to be some activity which could be characterized as "secondary boycott" activity. Yet, according to the court below, this activity will permeate the primary picket line and render the picketing union liable for all damage which results.

The court below acknowledged the weakness of its holding, admitting that the court "could be wrong." App. A., *infra*, p. 77. We submit, for the reasons stated herein, that the court was wrong and that the court's holding should be reviewed by this court.

A. The holding of the court below conflicts with established law relating to the right of a union to engage in a primary picket line.

It is firmly established that a union does not commit a secondary boycott by picketing an employer with whom the union has a dispute, even though the employer shares his premises with other employers, and

even though the employees of the other employers cease working as a result of the picketing:

Pure Oil Company, 84 NLRB 315[16];

Ryan Construction Company, 85 NLRB 417;

Sailors Union of the Pacific, 92 NLRB 547;

DiGiorgio Fruit Corp. v. NLRB, 191 F.2d 642 (DC Cir. 1951), cert. denied, 342 U.S. 869;

NLRB v. General Drivers, Local 968, 225 F.2d 205 (5th Cir. 1955), cert. denied, 350 U.S. 914;

Seafarers Union v. NLRB ..... F.2d ..... (DC Cir. 1959), 43 LRRM 2465.

Although the picketing may cause the neutral employees to cease doing business with the struck employer, this is the result of lawful primary activity and is *"damnum absque" injuria*. As the Second Circuit stated in *N.L.R.B. v. Service Trade Chauffeurs Local 145*, 191 F.2d 65 (2nd Cir. 1951):

> "... a union may lawfully inflict harm on a neutral employer without violating Section 8(b)(4) so long as the harm is merely incidental to a traditionally lawful primary strike conducted at the place where the primary employer does business."

The leading case is *Ryan Construction Company*, 85 NLRB 417 (1949). In this case the Bucyrus Company decided to build an addition to their plant and they engaged the Ryan Construction Company to do the work. While the construction work was in progress the

[16] The *Pure Oil Company* and *Ryan Construction Company* decisions were cited with approval by this court in *International Rice Milling Co. v. NLRB*, 341 U.S. 665, 672, n. 6.

Electrical Workers Union called a strike against Bucyrus and picketed the Bucyrus premises, including the entrance which was used exclusively by the Ryan employees. The pickets carried signs identifing Bucyrus as the employer being picketed. When Ryan employees refused to cross the picket line, Ryan filed unfair labor practice charges with the National Labor Relations Board, charging that the union was engaging in a "secondary boycott" under Section 8(b)(4)(A) of the Act. The Board found no merit in these charges. The Board held:

> "... Section 8(b)(4)(A) was not intended by Congress, as the legislative history makes abundantly clear, to curb primary picketing. It was intended only to outlaw certain *secondary* boycotts, whereby unions sought to enlarge the economic battleground beyond the premises of the primary employer. When picketing is wholly at the premises of the employer with whom the union is engaged in a labor dispute, it cannot be called 'secondary' even though, as is virtually always the case, an object of the picketing is to dissuade all persons from entering such premises for business reasons. It makes no difference whether 1 or 100 employees wish to enter the premises." 85 NLRB 417, 418.

These principles apply to the instant case. Here, petitioner Carpenters was engaged in an economic dispute with the respondent, because respondent refused to pay Carpenter members, employed by it, the wages, hours and working conditions which prevailed in the area. Pursuant to this dispute, the Carpenters called a strike and then began peacefully picketing the two construction sites involved. The picket signs clearly indicated

that the dispute was with the "Cisco Construction Company." The purpose or object of this strike and picketing was to force the respondent to grant the union's demands for the payment of the prevailing wages, hours and conditions. Under the principles laid down in the foregoing cases, the picketing of the respondent did not constitute a secondary boycott. It was lawful primary picketing in support of the Carpenters' dispute with Cisco, and the fact that employees of neutral employers observed the picket lines would not render it unlawful.

But, according to the court below, the job site picketing, even though it may have been lawful in the beginning, *became unlawful* as a result of the secondary activities of the various petitioners on the premises of the subcontractors. These activities were said to be such as to "infect" or "spoil" the job site picket lines. It could be concluded, says the court below, that an object of *all* of petitioners' conduct, including the job site picketing, was to induce the employees of the neutral employers (the subcontractors) to strike or engage in a concerted refusal to perform services with the end in view of forcing their employers to cease doing business with Cisco. We submit that the principles announced in the foregoing cases do not permit such a result. At all times relevant hereto, the job site picketing was conducted in the same way, in the same locations, with the same signs. If it was lawful picketing in the beginning, it was lawful throughout.

Furthermore, even if the job site picket lines somehow assumed such an "object" (because of the secondary activities of petitioners) this would not render

the picket line illegal. The Court of Appeals for the Eighth Circuit has ruled that, where an attempt is made to brand a primary picket line as a "secondary boycott" it is not enough to show that it is "an object" of such a picket line to influence the employees of neutral employers to cease work. *Local 618 Automotive Employees v. NLRB* (8th Cir. 1957), 249 F.2d 332. The court explained that the only proper test, in such a circumstance, is whether the primary picketing has "no legitimate purpose in connection with the primary strike." There has been no showing, in the instant case, that the job site picketing has no legitimate purpose in connection with the Carpenters' primary strike against the respondent.

The holding of the court below, conflicts with the established law regarding the right of a union to engage in primary picketing and it conflicts with the holding of the Eighth Circuit Court of Appeals with respect to the proper test to be applied in determining whether a primary picket line can become an unlawful secondary boycott.

By branding the primary strike and picketing as unlawful, the court below has deprived the members of petitioner Carpenters of valuable rights given them by the Act. The Act provides, in Section 7, that employees have the right to engage in "concerted activities" for their mutual aid and protection, and, in Section 13, that:

> "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike . . . " (App. B., *infra*, p. 83).

The right to strike can be taken away only where the Act specifically so provides. We submit that nothing in Sections 8(b)(4) or 303 provides that a union can be deprived of the right to strike and picket on the theory that, while such strike and picketing is taking place, the union and other unions engage in conduct elsewhere which constitutes a secondary boycott. *NLRB v. International Rice Milling Co.*, 341 U.S. 665, 672-673. At the time that Congress was considering the enactment of Section 8(b)(4), Senator Taft made very clear that the section was not designed to bar unions from encouraging employees to strike "if their conditions are not satisfactory." 93 Cong. Rec. 4198. Nor would it outlaw "strikes for higher wages and hours and better working conditions, which are entirely proper and which throughout this bill are recognized as completely proper strikes." 93 Cong. Rec. 3834.

B. The holding of the court below is not supported by the decisions of this Court.

The holding of the court below, to the effect that the job site picket lines, which were admittedly lawful when established became unlawful because of certain secondary activities of petitioners, rests entirely upon the court's interpretation of four decisions of this Court, all decided in the October term, 1950: *NLRB v. International Rice Milling Co., Inc., et al.*, 341 U.S. 665; *NLRB v. Denver Building and Construction Trades Council*, 341 U.S. 675; *International Brotherhood of Electrical Workers v. NLRB*, 341 U.S. 694; and *Local 74, United Brotherhood of Carpenters*, 341

U.S. 707. Based upon its analysis of these decisions, the court below concluded that the petitioners in this case could be judged by "their total activity." App. A, *infra*, p. 73.

We submit that these decisions do not support the holding of the court below. Indeed, two of these decisions (*Local 74, United Brotherhood of Carpenters* and *International Rice Milling*) actually support the petitioners position in this case.

In both *Denver Building and Construction Trades Council*, and *International Brotherhood of Electrical Workers, supra*, the union involved had a dispute with a certain non-union subcontractor working on a general construction job. But, instead of picketing this particular employer, the union set out deliberately to picket the neutral employers who were working on the construction site, in the hope that these employers would put pressure on the non-union subcontractor to force him to sign up with the union. In each case, the picketing which took place was primarily, if not entirely, aimed at the employees of the neutral employers. For example, the pickets carried signs which did not identify the subcontractor with whom the union had the dispute but, instead, made a general appeal stating "This Job Unfair." On this evidence the National Labor Relations Board found the unions, in each case, guilty of a violation of Section 8(b)(4)(A) of the Act, and this Court affirmed.

These cases are clearly distinguishable from the instant case. In neither case, was the Board or this Court

concerned with the question of whether a lawful primary picket line, aimed specifically at the employer with whom the picketing union has a dispute, can become unlawful because of subsequent secondary activities of the union involving employees of neutral employers. As noted above, the picket line in both *Denver* and *Electrical Workers*, was aimed, not at the primary employer with whom the union had the dispute, but at the neutral employers and their employees. The picket line was illegal from the very beginning.

The Court of Appeals for the Eighth Circuit has recently noted, as we point out here, that these two cases did not involve a lawful primary strike or picket line directed against an employer with who the union has a dispute. In *Local 618 Automotive Employees v. NLRB* (8th Cir. 1957), 249 F. 2d 332, the Court observed:

> ". . . in the cases just cited (Denver and Electrical Workers) there was no lawful primary strike involved against the owner of the premises."

We urge therefore, that the holding of the court below is not supported by the decisions of this Court in *Denver* and *Electrical Workers*. Those cases stand only for the proposition that a union which, in the first instance, establishes a picket line aimed at the employees of *neutral* employers, in an attempt to force those neutral employers to cease doing business with an employer with whom the union has a dispute, commits a secondary boycott. These cases did not involve a picket line aimed directly at the employer with whom the union has a dispute, as in this case, or the question of whether such a picket line can later become unlawful

because of other activities taking place away from the picket line.

Similarly inapposite is the decision in *Local 74, United Brotherhood of Carpenters, supra.* Indeed, this decision, fully considered, actually supports the position of the petitioners here. In this case, the facts showed that the Carpenters' Union was engaged in a dispute with the Watson's Specialty Store of Chattanooga, Tennessee, because the Watson's employees, who were employed to install floor and wall coverings sold by Watson were not members of the Carpenters Union. Pursuant to this dispute, the Carpenters peacefully picketed the Watson store. Sometime after the picketing began, one Stanley decided to renovate his home and he hired a number of workmen, including members of the Carpenters Union, to do this work. He also purchased some wall and floor coverings from Watson's but Watson's sent their own employees to do the installation work. When a representative of the Carpenters Union found that Watsons' non-union employees were working in the house, he went to the house and instructed the four members of Carpenters Union at work there (who were employees of Stanley) to leave the job. They did so. The Board held that the conduct of the union agent in ordering the members off the job constituted a secondary boycott proscribed by the Act. It was an attempt by the union to cause the employees of a neutral employer (Stanley) to strike with an object in view of having the neutral employer cease doing business with another person (Watson). This Court affirmed the Board's position. This case does not stand

for the proposition that the picketing of Watson's premises was unlawful, and, indeed, the Board did not even challenge that picketing. As this court noted, "The complaint was not against the picketing at Watson's store . . ." 341 U.S. 707, 712.

The court below, in discussing the *Carpenters* case, seems to read that case as holding that the primary picketing of Watson's store *was held unlawful*. The court below remarks that, in *Carpenters*, the original lawful action (i.e., the picketing) was held to "have become illegal." App. A, *infra*, p. 79. This misreading of the *Carpenters* decision may have contributed to the erroneous result reached below. We repeat, the *Carpenters* case did not involve an attack on the primary picket line at Watson's store. Neither the Board nor this Court held such picket line to be illegal in itself, or because it was "infected" by the other activities of the union.

Lastly, we submit that the decision in *International Rice Milling, supra*, also supports our position. The union there was engaged in a strike of the employer and maintained a picket line at his place of business. As employees of other employers having business with the struck employer approached the picket line, the pickets persuaded them not to go through. The Board held that this was lawful primary activity, and not a secondary boycott, and this Court affirmed. This Court specifically pointed out, in its decision, that "Congress did not seek, by Section 8(b)(4) to interfere with the ordinary strike." 341 U.S. 665, 672.

For the foregoing reasons, we submit that the decisions of this Court do not justify the holding of the court below to the effect that lawful primary picketing can become unlawful because, subsequent to its establishment, the picketing union or other unions, engage in activities away from the picket line which can be viewed as unlawful secondary activities. Indeed, the *Carpenters* and *Rice Milling* decisions seem to indicate that lawful primary picketing is not to be condemned because of secondary activities occurring away from the picket line.

The court below also found support for its position in *United Brick and Clay Workers v. Deena Artware* (6th Cir. 1952), 198 F.2d 637. In this case the union was on strike against the employer and placed a picket line at its main plant. At the time of the strike the employer had engaged a general contractor to construct a warehouse facility near the main plant. During the strike, the union placed pickets around the construction project, although none of Deena's employees were working there. The picketing caused the contractor's employees to quit work and Deena was unable to have the warehouse completed. Deena sued in a federal district court, under Section 303, for damages. A jury found that the picketing of the construction site, where none of Deena's employees were working, was a deliberate attempt to induce the employees of the contractor to cease work, and thus constituted illegal secondary boycott activity. The jury awarded damages of $29,985.05, and the Sixth Circuit affirmed. It is to be noted, however, that the jury limited its award to the injury caused

by the secondary activity only. Deena did not claim, and the jury did not find, that the secondary activity at the construction site rendered the primary picketing at the main plant unlawful, nor did it seek damages for the harm caused by the primary picketing at the main plant. This case does not support the holding of the court below. To the contrary, it indicates that primary picketing is properly "severable" from other secondary activity, and thus supports petitioners' position here.

C. The holding of the court below conflicts squarely with the position of the National Labor Relations Board in this case, and generally

The holding of the court below conflicts squarely with the position taken by the National Labor Relations Board in this case. As noted previously (*supra*, pp. 35-39) the National Labor Relations Board charged the petitioners with a violation of Section 8(b)(4)(A) of the Act by their conduct in this case which took place away from the job site picket lines. Acting through the Regional Director, the Board initiated a Section 10(l) injunction case against the petitioners in federal district court together with an unfair labor practice proceeding. The injunction proceeding was dismissed by the federal district court upon a finding that the illegal activities of petitioners had ceased and did not warrant the application of injunctive relief. *Graham v. Seattle District Council of Carpenters*, District Court for the Western District of Washington, Northern Division, Cause No. 3834 (unreported). The Board, however, proceeded with the unfair labor practice proceed-

ing and concluded that the petitioners had violated the Act as charged. *Seattle District Council of Carpenters*, 114 NLRB 27 (1955):

"Throughout the entire course of these proceedings the Board never claimed that the job site picket lines were illegal or advanced the theory that the job site picketing became illegal because of the other activities of petitioners. To the contrary, the Board conceded throughout that the job site picketing was, in all respects, legal. As the Board stated in its brief to the district court ". . . we do not contest the legality of the basic strike against Cisco or of the picketing of Cisco at the Redmond and Young's Lake construction sites by respondent Carpenters." The Board viewed the secondary activities of the petitioners as clearly severable from the job site picketing, and proceeded only against those activities.

The Board's position in this case is consistent with its position on other "secondary boycott" cases. If a union is engaged in lawful primary picketing at the premises of an employer with whom the union has a dispute, and, thereafter, extends its activities so as to deliberately and unnecessarily involve the employees of neutral employers, the Board will order the union to cease and desist from the latter activities, but will not challenge the primary picket line. The Board is careful to protect the statutory right of the union to engage in a primary strike and picketing. As the Board ruled in *United Construction Workers District 59*, 94 NLRB 1731 (1951):

"The respondents contend that the trial exam-

iner's recommended order is too broad in scope. We agree with respondents to the extent that their contention is directed to the fact that the trial examiner's recommended order as it now stands apparently would prohibit lawful recognition strikes by the respondent unions against the primary employers. We shall modify the trial examiner's recommendation in this respect."

See also *Teamsters Local Union No. 249*, 112 NLRB 311 (1955).

We recognize that the statute contemplates separate proceedings under Section 8(b)(4) and Section 303, and that a damage action under Section 303 is not dependent upon an adjudication by the Board under Section 8(b)(4). *International Longshoremen and Warehousemen's Union v. Juneau Spruce Corporation*, 342 U.S. 237.

We cannot conceive, however, that Congress intended that a federal district court could award damages to an employer for certain union conduct, under Section 303, where the National Labor Relations Board, operating upon the same set of facts, and applying a similar section of the Act, has determined that the conduct involved is lawful. This court has frequently alluded to the desire of Congress to achieve a "uniform application of its substantive rules" by confiding the administration of the Act to the National Labor Relations Board. *Garner v. Teamsters Union*, 346 U.S. 485, 490. If the federal and state courts are permitted, under Section 303, to apply their own version of the "substantive rules" and to reach a result on a given set of facts which conflicts with the Board's application of the "substan-

sive rules," then the desire of Congress for uniformity will be effectively frustrated. Compare *San Diego Building Trades Council v. Garmon*, ...U.S.... (April 20, 1959).

D. The holding of the court below is not justified by the facts of this case

We have demonstrated above that there is no legal justification or support for the "infection" theory advanced by the court below.

Further, even if we assume, *arguendo*, that such a theory is legally justifiable, and that a lawful primary picket line be "spoiled" by secondary boycott activities occurring away from the picket line, the application of such a theory to the facts of this case is completely unwarranted.

The facts of this case show that the job site picketing started on or about October 28, 1954, and continued until the construction projects were completed, sometime late in 1955. The illegal secondary activities which occurred took place during a four-week period, starting on November 5, 1954 and ending on or about December 7, 1954. Essentially, these activities were as follows:

(1) On November 5, 9 and 11, petitioner Carpenters picketed at the premises of the Cadman Sand and Gravel Company

(2) On November 5, an agent of petitioner Teamsters threatened an employee of Cadman's with the loss of his Teamster's withdrawal card unless he refused to load Cisco trucks

(3) On November 8, an agent of petitioner Operating

Engineers encouraged three employees of Cadman's to leave their jobs the next time the picket appeared at Cadman's.

(4) On or about November 15, petitioner Carpenters picketed at the premises of the Western Sand and Gravel Company.

(5) On or about November 29, an agent of petitioner Laborers Union threatened employees of Layrite Concrete Products with disciplinary action if they continued to load Cisco's trucks. These statements were retracted on December 7.

As noted previously all of these activities were ineffective. The employees involved uniformly rejected the appeals and threats made by petitioners and continued to load Cisco trucks. As the court below acknowledged:

> "Generally, it may be said that the away-from-the-job pressure, if it must be kept uncommingled with the job site picketing, did no substantial damage." App. A, *infra*, pp. 72-73.

To hold, as did the court below, that these brief, trivial and totally ineffective activities were such as to "spoil" the otherwise lawful and primary job-site picket lines, goes beyond the bounds of reason.[17] These activities, unlawful though they may have been, are clearly severable from the job site picket lines.

We also note that the activities in question had all ceased by the first week in December, 1954. This is the reason why District Judge Bowen refused to give the National Labor Relations Board a temporary injunc-

[17] We note that the court below held that the secondary activities would not be held to "infest" the primary picketing if they were "*de minimus*." App. A, *infra*, p. 73. Applying the court's own test, the activities here are properly regarded as "*de minimus*."

tion. On December 16, 1954, following a hearing in the matter, the judge ruled that the evidence established that petitioners "had in good faith brought an end to the complained of actions." See pp....., *supra*. Yet the court below has permitted respondent to recover damages flowing from the job site picket lines during a period of more than a year after these activities had ceased. If the secondary activities were sufficiently substantial so as to "infect" the primary picket lines, should not that "infection" cease when the secondary activities cease?

The unreasonableness of applying an "infection" theory to the facts of this case is illustrated by the result which has been reached here with respect to each of the petitioners. There is no evidence, for example, indicating that the petitioner Laborers Union had anything to do with the strike called by the Carpenters against Cisco or with respect to the establishment and maintenance of the job site picket lines. The only evidence with respect to this petitioner shows that on or about November 29, 1954, a month after the job site picketing began, an agent of the Laborers Union named Lucero, in an apparent desire to assist the Carpenters in their dispute with Cisco, attempted to persuade the employees of Layrite Concrete Products (who were members of the Laborers Union) not to load concrete blocks on Cisco trucks (R. 214-217, 222-223). These appeals were totally ineffective. The Layrite management instructed the employees to continue loading Cisco trucks and they did so (R. 218-219, 224). In addition, when Lucero's superior in the union found out about Lucero's activity he

disavowed it, and then ordered Lucero to return to Layrite and retract his previous statements (R. 231-232, 480-482). Lucero did as he was told and informed the Layrite employees that his union had no objection to their loading Cisco trucks (R. 219-220, 225, 235). Yet, in spite of the fact that Lucero's appeals were ineffective, and in spite of the fact that they were immediately disavowed by his union, and then retracted by him, the court below holds the Laborers Union severally liable to the respondent in the amount of $75,000.00. We submit that such a harsh result is not justified by the theory advanced by the court below, or by the facts of this case.

The inequitable and unjust result which has been reached in this case is indicative of the harm that could be done to the labor movement generally, if the holding of the court below is to stand. Unions will be subjected to tremendous financial liability for minor and totally ineffective secondary activities. The statute will be used, in effect, to collect punitive damages, rather than actual or compensatory damages.

2. This Case Raises Important Questions Relating to the Scope and Application of the Federal Shop Book Statute.

A. Description of exhibits and objections

Respondent's proof of financial damage rested essentially upon three exhibits: Plts. Ex. 38, 40 and 41.

Exhibit 40 is "a recapitulation prepared by the Seattle Office of the U.S.F.&G. (respondent's bonding company) of all receipts and disbursements on all the Cisco contracts and their affiliate companies" (R. 169).

Exhibit 38 consists of a balance sheet and profit and loss statement purporting to show the financial condition of respondent for the 13-month period from November 30, 1954, until December 31, 1955. This document was prepared by respondent's accountant. Insofar as the first two months of this financial period are concerned, the document is based on respondent's records, and, insofar as the last eleven months of the period are concerned, it is based on Exhibit 40 (R. 345, 413).

Exhibit 41 is a "Job Cost Summary" purporting to be a summary of respondent's expenses on the Redmond and Young's Lake projects. This exhibit was prepared by respondent's accountant from the records of the respondent and the records of the bonding company, including Exhibit 40 (R. 348-349).

Exhibits 38, 40 and 41 were offered in evidence at the same time (R. 348-349). Appellants objected to the admission of all three exhibits (R. 350-353). Appellants urged that the foundation exhibit, Exhibit 40, was inadmissible on the ground of competency; that its authenticity hadn't been established, that it was prepared by someone other than the witness who explained it, that the person who made the record was not called to testify; and, in addition, that it was not the best evidence and that it was generally irrelevant as it was merely a listing of the checks drawn by the bonding company and there was no indication as to what these checks were for (R. 357-352).

Appellants objected to Exhibits 38 and 41 becau-

they were based in large part upon Exhibit 40, and, as a result, the same objections that applied to Exhibit 40 would apply to these exhibits (R. 351).

The appellee argued that the "shop book rule" made Exhibit 40 admissible (R. 351-352). The trial court then ruled:

> "I have a little doubt about it, I must say, to be frank about it, but there is a pretty broad allowance made on this shop book rule. I am going to admit it now and allow you an exception. I have some doubt about it. Go ahead." (R. 352-353)

Petitioners renewed their objection in the court below but the court, without elaboration, held that the documents were admissible under the Shop Book Statute. App. A, *infra*, p. 80.

B. The statute

The federal Shop Book Statute (28 U.S.C. Sec. 1732) provides:

> "*Record made in regular course of business; photographic copies.*
>
> "(a) In any court of the United States and in any court established by Act of Congress, any writing or record, wherein the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in the regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

"All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

"The term 'business' as used in this section includes . . . business, profession, occupation and calling of every kind . . ."

C. Exhibit 40 not made at the time of the act and not authenticated

The statute requires that the entries be made at the time of the act or within a reasonable time by a person in charge of the records. In *Schering Corp. v. Marzall* (D.C. D.C. 1951) 101 F.Supp. 571, 573, the court held:

> "The Federal Shop Book rule is limited to routine, clerical entries made contemporaneously with the event by a person charged with the duty of maintaining the records. They do not extend to matters of opinion and similar matters."

Prince, superintendent of claims for the bonding company, identified Exhibit 40 "as an office record of U.S.F.&G. that is kept in the regular course of business" (R. 177). There was no testimony that "it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter" within the meaning of the statute.

Exhibit 40 was prepared by Douglas, not a professional accountant and not an employee of the bonding company, nor was he in charge of the books of the bonding company, on a fee basis. Douglas did not

testify: Prince testified that Douglas worked under his supervision, but Prince did not testify that he made all of the pertinent records available to Douglas, nor that Exhibit 40 was accurate (R. 177). It had never been checked for accuracy (R. 349-350), and was not known to be accurate (R. 386, 518).

It was a summary or recapitulation of the bonding company memorandum and records, and was not necessarily prepared at the time of the occurrence of the acts. Its sole purpose was for future reference as a convenience and consistent with this use, it could have been prepared much later at times convenient to both Prince and Douglas particularly since Douglas did this type of work as a sideline to his main job of engineer (R. 177).

D. Exhibit 40 was a summary and its admission is tantamount to admission *en masse* of innumerable books and office memoranda

Exhibit 40 includes without proper identification or possibility of separation, the commingling of loans with expenses, commingling of repayment of loans with payments by debtors; commingling of eight construction jobs including the two here involved; commingling of respondent-corporation with several subsidiary corporations; commingling of expenses attributable to the jobs with expenses of subcontractors which were advanced and later offset against the claims of such subs, etc. (R. 169-170; 548). Exhibit 40 did not identify the payee of the listed checks nor what the payment was for (R. 170, 346, 517).

To admit Exhibit 40 is to admit immumerable books, invoices, papers and office memoranda. Prince, superintendent of claims for the bonding company, who identified Exhibit 40, was subpoenaed and he testified that he couldn't bring all of the records because they filled two filing cabinets "and it would be a tremendous job" (R. 485).

In *Schmeller v. U.S.* (6th Cir. 1944) 143 F.2d. 544, 550, the Sixth Circuit disapproved of the admission in evidence by the trial court *en masse* of documents "taken from the files of and kept in the regular course of business . . . and stated to have been made, or 'presumably' to have been made at or about the time of the transactoins to which they refer" under the Shop Book Act. The court held that the "ordinary requirements of relevancy and competency" must be satisfied, and that the "purpose of the enactment of the Shop Book Statute was to eliminate the technical requirement of proving the authenticity of business records and memoranda by the testimony of the maker" citing *Lunday v. U.S.*, CA-6, 108 F.2d 698, 705. In reversing the trial court, the Court directed the trial court to examine and pass upon the admissibility of each separate document.

E. Exhibits 38 and 41 are based on Exhibit 40

Because of commingling and vagueness, Exhibit 40 was meaningless (R. 170, 346, 517). Skelton, accountant for respondent, used it as a base in preparing Exhibit 38 which consists of the balance sheets and profit and

loss statements covering the period of the two construction jobs here involved.

Exhibit 41 is the crucial job cost compilation by Skelton, also based on Exhibit 40. This was done by referring to the books of Cisco which were improperly and only partially kept, and principally to innumerable invoices and office data. Skelton testified that the books were not kept in the regular course and that he could not satisfy his audits.[18]

Upon cross-examination Cisco's accountant admitted that there were several inaccuracies and omissions in Exhibit 41 (R. 396, 399-402, 435-437, 440). He was unable to give any explanation for some of the items listed (R. 435, 436). There were so many errors in Exhibit 41, that respondent submitted two revisions of this exhibit, following the trial (R. 46-48, 51-52). These figures on these revised exhibits varied from $65,000.00 to $80,000.00 from the original (R. 51-52).

F. Exhibit 40 not relevant

The bonding company took over eight Cisco jobs, including the two here involved, and the jobs of several subsidiary corporations. The bonding company arranged a $150,000 bank loan and made advances from its general funds. As money came in, it withdrew

[18] Although the corporation was formed and started functioning on January 31, 1954, the books were not opened until October, 1954 (R. 111-2). The Company did not keep a job cost record nor any other accounts from which the information was available (R. 341-2; 512). Adjustments made by Skelton of $103,000 were never incorporated in the books (R. 340-369). The books were not set up right and not properly kept (R. 512). He testified that his audit was incomplete and that he had recommended a complete audit but that Cisco would not authorize it (R. 372).

moneys. It paid out moneys on account of sub-contractors' expenses and later charged them back against the sub-contracts so that these items did not constitute expenses of the jobs. The commingling of expenses on eight jobs, commingling of loans with expenses and repayment of loans with payments, and commingling of sub-contractors' accounts was immaterial to the bonding company. While we have contested that Exhibit 40 was kept in the regular course of business of the bonding company, yet assuming that it was so kept, it was irrelevant to the "regular business" of Cisco. To Cisco, any such commingling would render the accounting useless. Therefore, Exhibit 40 should not be considered as in the "regular course" of the business of respondent.

G. Not all records kept in the regular course are admissible

Not all records kept in the regular course comply with the Act. In *Palmer v. Hoffman*, (1943) 318 U.S. 109, the railroad had a practice of securing and retaining in its records the signed statements of its railroad engineers who were involved in train accidents at grade crossings. This type of report was held inadmissible as not pertaining to the systematic conduct of the railroad, but had its primary utility in litigating.

The court stated at p. 113-114:

> "But the fact that a company makes a business out of recording its employees' versions of their accidents does not put those statements in the class of records made 'in the regular course' of the business within the meaning of the Act. . . . The proba-

bility of trustworthiness of records because they were routine reflections of the day to day operations of a business would be forgotten as the basis of the rule. See *Conner v. Seattle R. & S. Ry. Co.*, 56 Wash. 310, 312-313, 105 P. 634. Regularity of preparation would become the test rather than the character of the records and their earmarks of reliability (*Chesapeake & Delaware Canal Co. v. U.S.*, 250 U.S. 123, 128-129) acquired from their source and origin and the nature of their compilation. We cannot so completely empty the words of the Act of their historic meaning. If the Act is to be extended to apply not only to a 'regular course' of a business but also to any 'regular course' of conduct which may have some relationship to business, Congress not this Court must extend it. Such a major change which opens wide the door to avoidance of cross-examination should not be left to implication. Nor is to any answer to say that Congress has provided in the Act that the various circumstances of the making of the record should affect its weight, not its admissibility. That provision comes into play only in case the other requirements of the Act are met.

"In short, it is manifest that in this case these reports are not, for the systematic conduct of the enterprise as a railroad business. Unlike payrolls, accounts receivable, accounts payable, bills of lading and the like, these reports are calculated for use essentially in the court, not in the business. Their primary utility is in litigating, not in railroading."

At page 415, the court laid down the test:

"But 'regular course' of business must find its meaning in the inherent nature of the business in question and in the methods systematically em-

ployed for the conduct of the business as a business."

II. Error in admitting Exhibits 38, 40 and 41

The trial court erred in admitting Exhibits 38, 40 and 41. These were the financial exhibits upon which respondent based its claim of damages. Without them, there was no proof of pecuniary damage.

The Trial Court was in doubt as to the admissibility of these three exhibits stating (R. 352-353):

> "I have a little doubt about it, I must say, to be frank about it, but there is a pretty broad allowance made on this shop book rule. I am going to admit it now and allow you an exception. I have some doubt about it. Go ahead."

The Court of Appeals sustained the admission without stating any reasons or authorities.

We submit that the receipt in evidence of these exhibits was error, contrary to the plain wording of the federal statute, this court's opinion in *Palmer v. Hoffman, supra,* and the federal rule announced by the lower federal courts.

CONCLUSION

For the reasons stated, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

On behalf of the Petitioners Carpenters Union, Local 131; Carpenters Union, Local 1289; Seattle District Council of Carpenters, affiliated with the United Brotherhood of Carpenters and Joiners of America,

AFL-CIO; Teamsters, Chauffeurs and Helpers, Local Union 174 International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America:

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On behalf of the Petitioner International Hod Carriers, Building and Common Laborers' Union of America, Local 440, AFL-CIO:

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APPENDIX A

1. OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CARPENTERS UNION, LOCAL 131; CARPENTERS UNION, LOCAL 1289; SEATTLE DISTRICT COUNCIL OF CARPENTERS, affiliated with THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO; TEAMSTERS, CHAUFFEURS AND HELPERS, LOCAL UNION NO. 174, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 302, AFL-CIO; and LOCAL 404, INTERNATIONAL HOD CARRIERS' UNION OF AMERICA, AFL-CIO, *Appellants*,

vs.

CISCO CONSTRUCTION CO., an Oregon corporation, *Appellee*.

No. 15,593
Apr. 13, 1959

Appeal from the United States District Court for the Western District of Washington, Northern Division

Before: POPE, FEE and CHAMBERS, Circuit Judges

CHAMBERS, Circuit Judge:

Cisco, the general contractor, mainly makes its case seeking damages[1] for unfair labor practices[2] (commit-

[1] The action was brought under Sections 301 and 303 of the Labor Management Relations Act of 1947, 29 U.S.C.A. § 185, § 187. Section 303 is commonly referred to as one of the secondary boycott provisions. In Pertinent part the latter section reads as follows:

"(a) It shall be unlawful * * * for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to * * *

ted by five locals and a labor council) from pressure conduct away from two job sites and usually at the place of business of Cisco's subcontractors. This "secondary" activity supplemented a stationary picket line at the job sites and roving picketing following Cisco's trucks established by a local of the carpenters' union.

Cisco had no contract with any union. It had contracts and "arrangements" with a number of subcontractors all of whom except one operated "union" shops. It had two separate United States army contracts at sites in Washington—the Redmond project and the Young's Lake project.

Generally, it may be said that the away-from-the-job

work on any goods * * * or to perform any services, where an object thereof is

"(1) forcing or requiring any employer * * * to cease using * * * or otherwise dealing in the products of any other producer, * * * or to cease doing business with any other person;

"(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees * * *;

"(3 forcing or requiring any employer to recognize or bargain with a particular labor organization * * *;

"(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization * * *

"(b) Whoever shall be injured in his business or property by reason of any violation of subsection (2) of this section may sue therefor in any district court of the United States without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

The Labor Management Relations Act, commonly known as the Taft-Hartley Act, was adopted as Public Law 101 of the 80th Congress. See 1947 U.S. Congressional Service 135, *et seq.*

[2] No minimum amount of damage or diversity of citizenship is required. See *United Brick & Clay Workers v. Deena Artware*, 6 Cir., 198 F.2d 637, cited *infra*. However, diversity of citizenship probably existed in this case.

site pressure, if it must be kept uncommingled with the job site picketing, did no substantial damage. The damage which Cisco did suffer would appear to have been caused because the subcontractors' union men just would not cross the picket lines at the job sites. The trial court expressly found that the first picket line as originally established was not illegal. And we think it implicit in the court's decision, findings of fact and conclusions of law, that if there had been nothing more than picketing, without the addition of other activity directed at or through the subcontractors, then recovery might have been denied. So it appears that the primary question here is whether we may take a concept of the totality of effort, charging all damage to defendants.

To us, the resolution of the problem mainly depends on how one reads four successive cases of the Supreme Court in the October Term, 1950. The cases are *N.L.R.B. v International Rice Milling Co., Inc. et al.*, 341 U.S. 665; *N.L.R.B. v. Denver Building & Construction Trades Council*, 341 U.S. 675; *International Brotherhood of Electrical Workers v. N.L.R.B.*, 341 U.S. 694; and *Local 74, United Brotherhood of Carpenters & Joiners of America v. N.L.R.B.*, 341 U.S. 707. From our analysis of these cases, we conclude that the defendants may be judged by their total activity during a period of time, provided the illegal activity is not *de minimis*.

The story of the trouble of the parties here begins on October 28, 1954, when the carpenter defendants (primarily the Seattle District Council) established pickets at the Redmond project. Picketing began a few days later at Young's Lake. The Banners of the pickets read:

"Cisco Construction Company unfair to wages and working conditions—District Council of Carpenters A.F.L." Also, roving pickets in cars followed Cisco's trucks, mainly back and forth from job site to the Cadman sand and gravel plant. The picketing continued until the jobs were completed late in 1955. All picketing seems to have been in the name of and actively directed by the district council of carpenters. There were minor and sporadic incidents of picketing occurring in the vicinity of two plants of subcontractors.

The work requiring carpenters was principally to be done by the general contractor and their place on the building schedule was much earlier than that of the trades of most of the subcontractors with their iron and metal workers, plumbers, electrician and painters.

As to Cisco, none of the defendants was a "bargaining representative" as defined by the Taft-Hartley Act. The first picketing began at Redmond after a carpenters' business agent approached the management of Cisco complaining that the employees on the job (some of whom were union carpenters) were not receiving overtime pay, certain transportation pay, and such fringe benefits as payments to the welfare funds of their unions, payments of the type that were ordinarily made by members of the Associated General Contractors of whom Cisco, an Oregon corporation, was one. Cisco was not ready to, and never did, accede to these demands. As a result, principally of the picket lines, Cisco could not get any of the subcontractors (except electrical which was nonunion) with their workers on the job sites. Most of the subcontractors had signed written contracts

with Cisco. Some subcontractors tested the picket line. When their union men turned back, they made no effort to force them to cross. Others did not even attempt to do that which was obviously useless. Gravel, sand, and mixed concrete were under subcontracts with "union" contractors and so were other segments of the job. The subcontractors would have made their own deliveries. As it was, Cisco had to take delivery in trucks it had leased and manned with nonunion drivers. Cisco had to find nonunion carpenters, painters, plumbers, iron and metal workers, machine operators and common labor to do behind the picket lines the work which ordinarily the subcontractors' union men would have done. There were many months of delay in completing the projects and the cost ran many thousands of dollars beyond the contract prices and Cisco's estimates. The defendants produced testimony to the effect that the whole loss was due almost entirely to bad management. But Cisco had a version which placed the fault of almost all of the delay on the defendants. Its witnesses said Cisco was hurt by difficulties and delays in getting men and by getting men unskilled for jobs they were undertaking to do. Then there was an unusually high turnover of men due, it said, to necessity to discharge many men who proved unsuitable. The only real means of getting men was by advertisements in newspapers. The trial court was unwilling, on the evidence, to trace all of the losses and delays to the defendants. But believing that there was substantial damage chargeable to the defendants and announcing that it found the damage from defendants' act to be "not less than $75,000," judgment was therefore ordered in that amount.

There was activity of business agents of the defendants on the secondary front with the subcontractors, which was obviously credited by the trial court, that shows a concert of action among the defendants to bring pressure on those who had no dispute with defendants to cause them to cease doing business with it. These acts consisted of one or two, usually two, agents of various defendants either bringing pressure on the workmen of the subcontractors or on the subcontractors directly to stop doing business with the plaintiff. If the agents of defendants had been credited on the stand by the court the agents were doing nothing except "trying to be helpful." If the trial court had ascribed substantial damage to these secondary or backyard activities, which it must have thought were quite real, then a greater detailing of facts would be appropriate. But as it is, we believe it sufficient to say on the evidence most favorable to Cisco, which view must be taken because of the findings below, these activities away from the job site show the concert of all defendants, that the acts were rather aggressive and calculated to cause others than carpenters to cease doing business with Cisco.

Judgment having been entered against the defendants, they have appealed.

The defendants' first point is that the case should be remanded for the trial court to make sharper findings. Of course, the purpose of findings is to tell someone else how the court reached its decision. Whether this court was wrong or right in its decision in *Irish v. United States*, 225 F.2d 3, (relied on by defendants) there was an uncertainty there among the appellate judges as to

how the trial court had reached its decision. Therefore, this court asked the trial court to make additional findings. Here it seems all too apparent that the defendants have been held liable by the trial court not for actual damage from the activities away from the job site but because of difficulties mainly behind the picket line. But the court has allowed the plaintiff to totalize defendants' concerted effort and the bad to infect that which was originally good. We take the view that the trial court has already done what defendants want us to force the trial court to do more explicitly. Taking this view, sending the case back for further findings would be a useless act.

The *Rice Milling*, the *Denver Building*, the *Electrical Workers* and the *Carpenters Union* cases, cited *supra*, all arise under Section 8, (b)(4) of the Labor-Management Relations Act and began as proceedings before the N.L.R.B. However, Section 303 used here, is the identical twin for use in civil actions for damages where there is secondary activity.

Of course, if the activities of the defendants must be strictly compartmentalized and the activities treated as wholly severable, then this court could be wrong. (Still it would always appear that the purposes of the original picket lines at a very early date acquired the secondary object as something very much in the forefront.) To us it seems that one of the purposes of the Taft-Hartley Act was to permit a union to picket and to strike without interruption so long as it played the game fair and "according to the book." But the right is unfair if there is wholesale violence on the picket line (there was not

here) or if the union vigorously sets out in a concerted effort to keep other subcontractors from doing business with the contractor. Although in *Race Milling*, it was held there was no concerted conduct, it would seem the following extracts, 341 U.S. 665 at 671 are apposite:

> "* * * The limitation of the complaint to an incident in the geographically restricted area near the mill is significant *although not necessarily conclusive*: * * * A union's inducements or encouragement reaching individual employees of neutral employers only as they happen to approach the picketed place of business *generally* are not aimed at concerted, as distinguished from individual conduct by such employees. *Generally*, therefore, such actions do not come within the proscription of * * (b)(4), and they do not here." (Emphasis supplied.)

Perhaps the strongest case for plaintiff is the *Denver Building Council*. There the principal activity was a nonviolent picket line. The general contractor and most of the subcontractors were "union" companies with no difficulties of their own with the building council. But there was an electrical subcontractor on the job who operated nonunion. The board found the purpose of the pickets was to get the electrical company off the job by bringing pressure on the general contractor and the other subcontractors. This was held to be a wrongful object. So in Cisco's troubles it would appear that the initial object of better conditions for carpenters became one of forcing Cisco to do more than to improve the lot of carpenters on the job. But most important the means became too aggressive although they remained neu-

violent. The efforts aimed at subcontractors took on a substantial character far beyond incidental. If a picket line at the job can take on an unfair objective, it would seem to follow that one at the job can be spoiled because of away-from-the-job activity.

The *Electrical Workers* case is quite similar to the *Denver* case. Nothing could have done the union general contractor any damage except the picket line. While not a damage case, the picket line supplemented by some activity away from the job site was held illegal. So the test is not merely: Is there a picket line? But: What is the object and what is the whole situation?

Again the *Carpenters Union* case involved a picket at a subcontractor's place of business, plus activity of union agents at the job site. There was no picket at the job site. Doubtless the pickets at the place of business, without more, did not violate any provision of the Labor Management Act. But the object of the totality of action resulted in the finding of an unfair labor practice on the part of the union. The statute was not effective until after the picketing began, but the original lawful action was held to have become illegal after the act. Some legitimate objectives did not save the activity from being a violation of law.

In our view, *United Brick & Clay Workers v. Deena Artware*, 6 Cir., 198 F.2d 637, supports our conclusion that the totality of the effort may be considered and shows that when one of the real objects becomes to reach the contractor through an innocent third party (by concerted action, of course) then he who has suffered may

recover. The finding of concert of action in Cisco's case was not required, but certainly on the evidence was not error.

Defendants specify certain rulings on the admission of evidence. We have carefully gone over the rulings and find no reversible error. In one instance evidence was admitted without objection, but later made the subject of a motion to strike. In another instance it was only cumulative evidence, even if it should have been rejected. Certain exhibits were admitted over objection as not being properly identified. We are convinced the exhibits come well within the shop book rule. See 28 U.S.C.A. 1732. There was some valid argument that the exhibits shouldn't be given much weight. But that was up to the trial court.

Objection also is made to the fact that the trial court adopted by reference certain findings made by the National Labor Relations Board in the parallel unfair labor practice "cease and desist" case. Our examination of the findings convinces us that the trial court did not accept the findings as a matter of *res judicata* but as a shorthand method of relating that it too found the same thing. The key portion attacked reads as follows:

> "* * * [T]he conduct of defendants by their agents directed at plaintiff's subcontractors and their employees is set forth in detail in the reported National Labor Relations Board decision, *Seattle District Council of Carpenters, et al.*, and *Cisco Contsrgction Company*, 114 NLRB 27, Case No. 19-CC-72, dated September 9, 1955, which said findings in said decision and report are adopted by

this Court herein and by this reference are made a part of these findings of fact; * * * *"

The judgment is affirmed.

(Endorsed:) Opinion. Filed Apr. 13, 1959.

PAUL P. O'BRIEN, *Clerk.*

APPENDIX A

2. JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CARPENTERS UNION, LOCAL 131, *et al.*, *Appellants*, vs. ISCO CONSTRUCTION CO., etc., *Appellee.*	No. 15,593

JUDGMENT

Appeal from the United States District Court for the Western District of Washington, Northern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington, Northern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(ENDORSED) Judgment

Filed and entered: April 13, 1959

PAUL P. O'BRIEN, *Clerk*

APPENDIX B

STATUTES INVOLVED

1. Labor Management Relations Act of 1947

Pertinent sections of the Labor Management Relations Act of 1947, as amended, 61 Stat. 136, 29 U.S.C. Secs. 141-188, are as follows:

Definitions

"Sec. 2. When used in this Act—

* * *

"(7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * *

Rights of Employees

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

* * *

Unfair Labor Practices

"Sec. 8(b) It shall be an unfair labor practice for a labor organization or its agents—

* * *

"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is:

"(A) forcing or requiring . . . any employer or other person . . . to cease doing business with any other person;

* * *

Limitations

"Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

* * *

Suits By and Against Labor Organizations

* * *

"Sec. 301 (b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

"(c) For the purposes of actions and proceedings by

or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorzed officers or agents are engaged in representing or acting for employee members.

* * *

"(e) For the purposes of this section, in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

* * *

Boycotts and Other Unlawful Combinations

"Sec. 303 (a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

"(1) forcing or requiring . . . any employer or other person . . . to cease doing business with any other person;

* * *

"(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in con-

troversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

* * *

2. Shop Book Rule Act

Pertinent sections of the federal Shop Book Rule Act, 49 Stat. 1561, as amended, 28 U.S.C. Sec. 1732, are as follows:

"Sec. 1732: Record made in regular course of business; photographic copies

"(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

"All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

"The term 'business' as used in this section, includes business, profession, occupation, and calling of every kind."

* * *

FILE COPY

In the Supreme Court of the United States.

OCTOBER TERM, 1959

No. 206

CARPENTERS UNION, LOCAL 131; CARPENTERS UNION, LOCAL 1289; SEATTLE DISTRICT COUNCIL OF CARPENTERS, affiliated with THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO; TEAMSTERS, CHAUFFEURS AND HELPERS, LOCAL UNION NO. 174, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 302, AFL-CIO; and LOCAL 440, INTERNATIONAL HOD CARRIERS, BUILDING AND COMMON LABORERS' UNION OF AMERICA, AFL-CIO,

Petitioners,

vs.

CISCO CONSTRUCTION CO., an Oregon corporation,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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In the Supreme Court of the United States

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OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Pet. 71-81) is reported in 266 F. (2d) 365.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on April 13, 1959 (Pet. 81). The Petition for Writ of Certiorari was filed—served on Respondent—on July 13, 1959. The jurisdiction of this court was invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

The decision of the court below is NOT in conflict with the decision of another court of appeals. It does NOT present a question of Federal law which has not been decided and which should be settled by the Supreme Court. It is NOT in conflict with applicable decisions of the Supreme Court. Indeed, it is based explicitly on four latest applicable decisions of the Supreme Court (Pet 73).

The first and principal question is a fourth tender of an issue argued, briefed and carefully considered by the National Labor Relations Board (Seattle District Council of Carpenters, 114 N.L.R.B. 27, 1955) and both the trial and appellate courts below and decided adversely to petitioners' contention on all three occasions. The second question, seemingly a make-weight issue, challenges the propriety of the reception and consideration (by the trial court, no jury) of three accounting exhibits.

1. The first question is whether or not a job site picket line accompanied and supplemented by admit-

tedly illegal coercive secondary action (Pet. 40); by "unlawful 'secondary boycott' activities" were so commingled that the "totality of effort" directed towards a single objective provides the basis for the recovery of damages resulting therefrom, pursuant to Sec. 303, Labor Management Relations Act.

2. There were received in evidence respondent's Exhibits 38, 40 and 41. These were offered to establish the additional costs incurred by respondent in the completion of the two contract jobs as the result of petitioners' illegal activity. Petitioners contend that these documents were not admissible under the shop book rule (28 U.S. C. Sec. 1732). Actually, Exhibit 40 was the only one of the three exhibits offered under this rule (R. 351). It was a record of receipts and disbursements on behalf of respondent maintained by the United States Fidelity and Guaranty Company at the time it was administering respondent's affairs. It was kept under the supervision of Mr. A. O. Prince, Superintendent of Claims, in the Seattle office of the company, and a part of the company's records (R. 169). Exhibit 38 consisted of a balance sheet and profit and loss statement purporting to show the financial condition of respondent for the thirteen-months' period from November 30, 1954 until December 31, 1955. It was prepared by respondent's certified public accountant and was based upon respondent's records and the data contained in Exhibit 40. Exhibit 41 was a "Job Cost Summary" purporting to be a summary of respondent's expenses at the Redmond and Youngs Lakes projects. This also included some data from Exhibit 40. Both Exhibits 38 and 41 were identified

and explained by Mr. Harry Skelton, certified public accountant, who prepared these exhibits. The original records were prior to trial made available to and examined by petitioners' accountants (R. 512) and were in court (R. 313) during the trial.

STATUTES INVOLVED

1. Labor Management Relations Act of 1947

Pertinent sections of the Labor Management Relations Act of 1947, as amended, 61 Stat. 136, 29 U.S.C. Secs. 141-188, are as follows:

Unfair Labor Practices

"Sec. 8(b) It shall be an unfair labor practice for a labor organization or its agents—

* * *

"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is:

"(A) forcing or requiring . . . any employer or other person . . . to cease doing business with any other person;

* * *

Limitations

"Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

* * *

Boycotts and Other Unlawful Combinations

"Sec. 303 (a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

"(1) forcing or requiring . . . any employer or other person . . . to cease doing business with any other person;

* * *

"(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

* * *

2. Shop Book Rule Act

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course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrent, or event or within a reasonable time thereafter.

"All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

"The term 'business' as used in this section, includes business, profession, occupation, and calling of every kind."

* * *

STATEMENT OF FACTS

In view of the following admission in the petition (Pet. 40) an extended statement of fact is unnecessary:

> "After the job picket lines were established Cisco made arrangements to pick up materials at the premises of some of the subcontractors. When this project got under way, agents of the petitioners made various appeals to the employees of these subcontractors urging them not to load Cisco trucks with materials. . . . Petitioners conceded below and concede here that these activities constituted 'an attempt to induce . . . the employees (of the subcontractors) to engage in . . . a concerted refusal in the course of their employment to . . . handle or work on any . . . materials . . . (with an object in view of) forcing or requiring . . . (the subcontractors) 'to cease doing business with (the respondent)'."

The "various appeals" referred to in the quotation above were found by the National Labor Relations Board to include petitioners ". . . picketing of . . . (two subcontractors) which was conducted at least in part to

force those secondary employers to cease doing business with Cisco by inducing and encouraging their employees to engage in a strike or concerted refusal to work . . .": persuasion, instruction, orders and threats to respondent's subcontractors and their employees (*Seattle District of Council of Carpenters*, 114 N.L.R.B. 27) (1955) R. 34-48).

The Board found further:

"from these facts and the record as a whole make it plain that the operation of Cisco at Redmond and Youngs Lake on a non-union basis was a matter of concern to all of the respondents and that respondent Carpenters' activity (a job site picket line) against Cisco and the action taken by the other respondents whose manifest purpose was to implement and further the effectiveness of respondent Carpenters' activity (again the job site picket line) were all directed toward the same end, namely, to secure the unionization of Cisco's employees." (Material in parentheses added)

The court below found that:

"This 'secondary' activity supplemented a stationary picket line at the job site . . ." (Pet. 72)

That

"there was activity of business agents of the defendant on the secondary front with the subcontractors which was obviously credited by the trial court that shows a concert of action among the defendants to bring pressure on those who had no dispute with defendants to cause them to cease doing business with it."

That

"These activities away from the job site show the concert of all defendants that the acts were rather aggressive and calculated to cause others than Carpenters to cease doing business with Cisco." (Pet. 76)

The trial court and the National Labor Relations Board (*Seattle District Council of Carpenters*, 114 N.L.R.B. 27, 1955), likewise found and held that the various phases or activities of petitioners were not severable but were so comingled and supplemental to the picket line as to render the entire campaign of coercion and intimidation illegal.

ARGUMENT

The strike by a Union is a right which the law recognizes, so long as it is carried on legally and for legitimate purposes. The moment the purposes become illegal and in violation of the prohibitions of the law, the strike become illegal and it matters not where the picket line may be maintained. The court below, after remarking "still it would always appear that the purposes of the original picket line at a very early date acquired the secondary object as something very much in the forefront." went on to say

> "To us it seems that one of the purposes of the Taft-Hartley Act was to permit a union to picket and to strike without interruption so long as it played the game fair and 'according to the book' but the right is unfair if there is wholesale violence on the picket line (there was not here) or if the unions vigorously set out in a concerted effort to keep other subcontractors from doing business with the contractor." (Pet. 77, 78) [1]

[1] Any lingering doubt that "a purpose" of the picket line was to "encourage" employees of subcontractors to refuse to perform services for their employers in performing their contracts with respondent is completely dissipated by the occurrence of the latter part of 1954, when petitioners called a meeting of respondent's subcontractors and told them to break their contracts with respondent (R. 243, 273, 274), and the later meeting of March, 1955, between petitioners and respondent's vice president, when permission to permit subcontractors to perform was again refused (R. 271, 242).

This seems not only to be the law as established by the decisions reviewed by the court below, but certainly is the only wholesome and reasonable interpretation of the purpose of the law. In the instant case, as long as the picket line remained "as originally established" and without any additional conduct which evidenced a purpose and intent of coercing subcontractors through their employees, from doing business with the contractor, no court could hold the picket line illegal, but when the establishment of that picket line was "supplemented" immediately by sending pickets to subcontractors' premises, even when the contractors' trucks were not there, and by numerous acts of coercion of subcontractors' employees, which petitioner admits were violative of the statute, "it would be manifestly unrealistic" to consider any of these activities "in isolation rather than as part of a total pattern of conduct engaged in by the respondents in connection with this controversy." The N.L.R.B. specifically found that this campaign of coercion by petitioners "whose manifest purpose was to implement, and further the effectiveness of respondent Carpenters' activity" to-wit: its initial picket line "were all directed toward the same end," constituted an illegal boycott, which they were ordered to stop.

The decision of the trial court not only adopts and approves these findings of the Board, but clearly states that the picket line as initially established was legal until the further acts and conduct of petitioners demonstrated the illegal purpose of the picket line and rendered their whole campaign of coercion against subcontractors illegal.

In complete harmony with both the Board decision and the opinion of the trial court is the opinion of the court below. As indicated in the excerpt quoted above it recognized that "one of the purposes of the Taft-Hartley Act was to permit a union to picket and to strike without interruption so long as it played the game fair and 'according to the book'," and then points out that this right to strike or picket is not protected "if the union vigorously sets out in a concerted effort to keep other subcontractors from doing business with the contractor." (Pet. 77-78). It put the question succinctly as follows:

> "So the test is not merely: is there a picket line? but: what is the object and what is the whole situation?" (Pet 79)

N.L.R.B. v. Denver Building & Construction Trades Council, 341 U.S. 675, 71 S. Ct. 943.

International Brotherhood of Electrical Workers, Local 501 v. N.L.R.B., 341 U.S. 694, 71 S. Ct. 954.

N.L.R.B. v. International Rice Milling Co., Inc., 341 U.S. 665, 71 S. Ct. 961.

Local 74, United Brotherhood of Carpenters & Joiners of America v. N.L.R.B., 341 U.S. 707, 71 S. Ct. 966.

The above cases are the decisions of the Supreme Court upon which the court below rested its decision. It said:

> "To us the resolution of the problem mainly depends upon how one reads four successive cases of the Supreme Court in the October term, 1950 (citing the above). From our analysis of these cases we conclude that the defendants may be judged by

their total activity during a period of time provided the illegal activity is *not deminimus.*"

These decisions are still the law of the land. No later decision was cited in the petition nor has been found which compromises the validity or force of these decisions.

Petitioners concede (Pet. 49) that the *Denver* case and the *Electrical Workers* case establish the rule that the strike or picket line even at a job site which is established for the purpose of exercising pressure or coercion on employees of subcontractors or third parties, is illegal. They attempt to distinguish these cases on the ground that the strike and picket line was "illegal from the beginning." Clearly, if an illegal purpose will "infect" or "spoil" a strike or picket line from the beginning it can be "infected" or "spoiled" at a later time by the same illegal purpose. It makes little difference whether the poison is inserted into the goblet before the wine is poured in, or after. At the moment the two become comingled and the potion is "spoiled." At the time a strike or picket line is supplemented and comingled in a general campaign of illegal coercion it becomes "spoiled" and illegal.

In discussing the case of *United Brotherhood of Carpenters etc. v. N.L.R.B.*, supra, the court below makes this observation, after noting that the picket line in that case, as originally established, did not violate the law:

"The object of the totality of action resulted in the finding of an unfair labor practice on the part of the union. The statute was not effective until after the picketing began, but the original lawful action

was held to have become illegal after the Act. Some legitimate objectives did not save the activity from being a violation of law." (Pet. 79)[2].

After reviewing the above decisions by the Supreme Court the court below observes that they support

> "our conclusion that the totality of the effort may be considered and show that when one of the real objects becomes to reach the contractor through an innocent third part (by concerted action of course) then he who has suffered may recover." (Pet. 79)

Neither the National Labor Relations Board nor the District Court found or held that the initial picket line continued to be legal after it was coupled with acts and conduct of petitioners that were part of a well-cordi-

---

[2] Typical of the strained subjective reasoning of petitioners appears in their discussion of the *Carpenters* case, supra (Pet. 52).

The strike at Watson was prior to August 22, 1947.

"On August 22, 1947, par. 8 (b)(4)(A) took effect.

"Watson promptly filed a charge with the National Labor Relations Board based on the continuance of the above strike by petitioners on and after August 22nd. The Regional Director issued a complaint. . . ."

To the contention that the strike was originally legal, and that nothing further had been done after August 22nd, the Supreme Court said:

"The answer turns on what actually took place on and after August 22nd. As to that the Board concluded:

"'Nor is it material . . . that the labor dispute had its origin before the effective date of the amended Act, for we are convinced that it was continued and prolonged after the effective date by the very same factors which originally created it and *for the same original objective*, which, as found above, Sec. 8 (b)(4)(A) declares unlawful." (Emphasis supplied)

The interpretation placed on this decision by the court below (Pet. 79) is sound and appropriate to the point under consideration.

nated "joint venture" campaign "whose manifest purpose was to implement and further the effectiveness of respondent Carpenters' activity" to-wit: its initial job site picket line and "were all directed toward the same end."

> "What the trial court did, says the court below, is to find that the job site picketing which was admittedly lawful when established became unlawful as a result of the secondary activities of the petitioner." (Pet. 41-42)

This is precisely the position taken by the Board and no careful and considered reading of the Board's finding and order will sustain any different interpretation.

In his closing argument Mr. Bassett, Chief Trial counsel of petitioners, made the following admissions (R. 34):

> "I am handing up to Your Honor the findings of the Examiner which were accepted by the Board and I think we both agree these findings were correct. (Tr. 2)."

And later:

> "To get back to my original statement whether we are right or wrong I am ready to be judged by what the Board said. The Board certainly investigated this case. (Tr 9, 10)."

* * * * *

One fact stands out above all others. As the result of petitioners' conduct and activities, *every one of respondent's subcontractors (with the exception of a small non-union electrician) defaulted on their contracts with respondent*, contracts that covered 75% of the work on these two vital, military installations.

After having carefully weighed all of the arguments here advanced by petitioner and after deliberate consideration of the records, the trial court found:

> "The subcontracts specified a total cost of approximately $600,000.00 to plaintiff for services and materials for the Redmond and Youngs Lake jobs. When plaintiff was required to provide in whole or in part the services and materials defaulted under the subcontracts, it was put to an expense therefor of at least $75,000.00 above the subcontract cost. The court finds plaintiff's damage in the amount just stated by reason of the unlawful and concerted activities of the defendant resulting in nonperformance of the subcontracts."

Admissibility of Exhibits 38, 40, 41

Petitioners' contention that Exhibits 38, 40 and 41 were admitted by the trial court under the Shop Book Rule is erroneous. Only Exhibit 40, which was a record of the United States Fidelity and Guaranty Company's receipts and disbursements in connection with respondent's contracts, was offered under the Shop Book Rule (R. 352) 28 U.S.C. Sec. 1732.

Exhibit 38, a balance sheet and profit and loss statement, prepared by respondent's certified public accountant from respondent's books of original entry, and Exhibit 40, and Exhibit 41, a "Job Cost Summary," also prepared by respondent's certified public accountant, from the same sources, were admitted on the basis of the testimony of their identification by the author. Petitioners' objections to these exhibits may be summarized in the following excerpts from the testimony:

"Mr. Vance: (Petitioners' then attorney) If your

Honor please, we object to all of these. I objected to 40 when it was offered on the grounds that it doesn't show anything. Mr. Prince testified that somebody in their office prepared it; that all they did was they had an invoice and they would pay it, and there is no proof here——

The Court: I thought Mr. Prince said he checked in each instance to see that the material or work, or whatever it was, was performed on the job.

Mr. Vance: (after further discussion)——We further object to the document on the grounds of competency. Its authenticity hasn't been properly established. Nobody was called here to testify who made any such record or entries, or anything.

Our principal objection is to the fact that it just doesn't prove anything.——

The Court: And your objection to the other two, 38 and 41, is predicated on the same basis insofar as 38 and 41 are founded on 40, is that the idea?

Mr. Vance: That is correct, your Honor.

The Court: What do you have to say, Mr. Brown?

Mr. Brown: Our point on this objection is that these exhibits—this Exhibit 40 according to the testimony of Mr. Prince, which I believe your Honor quoted corrected, that he did check . . . It was made under his general supervision . . .

"This is a shop record. This is the way that U. S. F. & G. kept its records. . . . this is the way the U. S. F. & G. kept records on that job. They have a right to check into it and see all of the records substantiating that document. They have been made available and will continue to be . . . It is a shop book, and as such it is entitled to be admitted subject to whatever weight the Court in view of all the testimony sees fit to accord it.

(Further argument.)

The Court: Well, that was a thought I had in mind about it, that it went to the weight and not the admissibility. I think that is right." (R. 350, 351, 352)

It appears from the testimony all of these records were in court and had been made available to petitioners. They had prepared their own studies from them and subjected respondent's accountant, Mr. Skelton, to a searching cross-examination on all of the details (R. 361-393, 433, 437).

The testimony of Mr. Albert O. Prince, Superintendent of Claims of U. S. F. & G. and under whose supervision Exhibit 40 was prepared and maintained, appears in a record, pages 169 to 172. It was on the basis of this testimony, direct and voir dire, that the court admitted Exhibit 40 under the Shop Book Rule. There would seem to be little question but what it complies fully with the provisions of 28 U.S.C. Sec. 1732, particularly in view of the following provisions in said statute:

> "All other circumstances of the making of such writing or record including lack of personal knowledge by the entrant or maker may be shown to affect its weight but such circumstances shall not affect its admissibility."

CONCLUSION

The decision of the court below is not in conflict with the decision of any other court of appeals. It raises no new or undecided question. It is not only in harmony with, but explicitly based upon, applicable decisions of the Supreme Court.

The petition should be denied.

Respectfully submitted.

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